IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1289

.....

LUTHERAN HOSPITAL OF MILWAUKEE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

.....

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Lutheran Hospital of Milwaukee, Inc. ("Hospital") respectfully prays that a writ of certiorari issue to review the final judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 19, 1977.

OPINIONS BELOW

The October 5, 1977 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 564 F.2d 208 and is reproduced in the Appendix at pages 21-40 B. The May 27, 1976 decision and order of the National Labor Relations Board ("Board") is reported at 224 NLRB 176 and is reproduced in the Appendix at pages 41-73.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was dated and entered on December 19, 1977, granting in part and denying in part enforcement of the Board's May 27, 1976 order. On December 1, 1977, the Court of Appeals denied Petitioner's motion for leave to file a petition for rehearing *in banc instanter*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the National Labor Relations Board properly conclude that it was unlawful for the Hospital to ban union solicitation and literature distribution in areas such as the hallways and lounges in patient wards, the elevators and stairways which connect the patient wards, the chapel, and the lounge in which family members await the results of surgery?

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the *National Labor Relations Act, as amended (29 U.S.C.* § 151 *et seq.*) ("Act") are set forth in the Appendix at pages 19-20.

STATEMENT OF THE CASE

Petitioner Hospital is a nonprofit, 425-bed general hospital located in Milwaukee, Wisconsin, which employs approximately 850 persons. On September 30, 1974, Local 1199W of the National Union of Hospital and Health Care Employees RWDSU AFL-CIO ("Union") began a campaign to organize 450 to 500 of the Hospital's employees. An election petition was never filed although the campaign continued for approximately nine months. The Union did, however, file two charges against the Hospital alleging that it had committed unfair labor practices. Two complaints were

issued by Respondent and were consolidated for hearing before Administrative Law Judge Paul Bisgyer. In summary, the complaints alleged that the Hospital engaged in three coercive interrogations of employees; coerced employees by sending them a letter asking that they inform the Hospital of harassment by union pamphleteers; promulgated and maintained in effect since April 25, 1975, an "overly broad" no-solicitation/distribution rule which prohibited such activity in any area of the Hospital to which patients and visitors had access; and discriminatorily enforced an earlier version of the rule. The hearing was held on June 19, 1975 and Judge Bisgyer issued his recommended decision and order on February 27, 1976.

Judge Bisgyer found that the Hospital had enforced its earlier no-solicitation/distribution rule in an even-handed manner and that it had not been discriminatorily enforced. Judge Bisgyer also found one of the interrogations lawful. He did find that the Hospital violated the Act in the other two instances of interrogation, by sending the letter and by issuing the revised no-solicitation/distribution rule. Judge Bisgyer noted that such rules were presumed invalid under traditional Board precepts if they prohibited solicitation during nonworking time or prohibited distribution in nonwork areas during nonworking time. To the extent that such activity occurred in patient and visitor access areas, the Hospital's rule did both and hence was unlawful.

In its May 27, 1976 decision and order, the Board affirmed and adopted in all respects Judge Bisgyer's recommended decision and order. In a footnote, the Board stated that subsequent to Judge Bisgyer's decision, it held in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976) that no-solicitation/distribution rules which prohibit such activity in all areas of health care institutions to which patients and visitors have access, other than immediate patient care areas, are presumed to be unlawful. Thus, unless the area of the institution were deemed to be an "immediate patient care area," the Board's traditional rules relating to solicitation and distribution would continue to apply. Relying upon its *St. John's* decision, the Board upheld Judge Bisgyer's decision relating to the Hospital's rule.

The Seventh Circuit, which had jurisdiction pursuant to 29 U.S.C. § 160(f), granted partial enforcement of the Board's order. The court rejected the Board's findings that the Hospital coercively interrogated its employees. The court affirmed the Board's finding relating to the union harassment letter and also enforced the order based upon the finding that the no-solicitation/distribution rule was overly broad.

The rule reads:

> "We receive numerous requests from various persons, groups and organizations to be allowed to solicit patients or employees for various causes, or be allowed to distribute books, pamphlets, etc. throughout the hospital. These are a source of annoyance to the patients, as well as disruptive to our routines. This had led us to adopt a rule prohibiting members of the public from doing any soliciting or any distributing of material on hospital premises at any time. Outside of working hours an employee becomes a member of the public, and the foregoing rules will apply.
>
> During working hours, employees should not solicit or distribute written matter for any purpose in any part of the hospital during working time. ('Working time' applies not only to the employee *doing* the soliciting, but includes the person *being* solicited.) During the non-working time of employees' working hours, solicitation is permitted only in non-patient and in non-public areas of the hospital, and distribution of written material is limited to non-work areas and non-patient areas and non-public areas."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE COURTS OF APPEAL FOR THE TENTH AND DISTRICT OF COLUMBIA CIRCUITS.

The decision below adopted the holding and reasoning of the Board in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976) to the effect that rules restricting solicitation and distribution in areas of a health care institution, other than immediate patient care areas, presumptively are invalid. The Tenth Circuit, however, recently denied enforcement of the Board's order in *St. John's* to the extent that it allowed solicitation and distribution in those areas to which patients and visitors had access. *St. John's Hospital and School of Nursing, Inc. v. NLRB*, 557 F.2d 1368 (10th Cir. 1977).

There can be no doubt that the decision below directly conflicts with the Tenth Circuit decision. The Seventh Circuit stated:

> "Both petitioner and the General Counsel. . . agree that the outcome. . .turns on whether we accept the Board's holding in *St. John's*. . . . Since the rule promulgated by the employer-hospital in *St. John's* was virtually identical to the rule at issue here, we shall treat the Board's reasoning in *St. John's* as directly applicable to this case." 564 F.2d at 213 (footnote omitted).

Thereafter the Seventh Circuit relied upon the Board's opinion in *St. John's* to sustain the Board's position in the instant case. The Seventh Circuit specifically approved "the distinction the Board has now drawn between hospitals and retail stores or restaurants" as well as "the Board's conclusion that special circumstances rebutting its usual presumptions with respect to solicitation and distribution exist in the immediate patient care areas of the hospital but do not exist ouside of those locations. . . ." 564 F.2d at 214, 215-16.

The Tenth Circuit, on the other hand, expressly rejected the holding and the reasoning of the Board in *St. John's*. For example, the court stated:

> "Although not controlling, when this factor [alternative means of communication available for solicitation and distribution] is considered in conjunction with the expressed congressional concern for protecting 'patient care' wherever possible, the conceded fact that solicitation may be unsettling to patients, and the absence of any record evidence to support a distinction between the sensibilities of bedridden vis-à-vis ambulatory patients we are compelled to conclude that the balance struck by the Board is unsupported and unreasonable. . . . We therefore deny enforcement of the Board's order insofar as it would permit solicitation in patient access areas." 557 F.2d at 1375.

The Seventh Circuit recognized that its decision in the instant case directly conflicted with that of the Tenth Circuit. According to the court below, "[s]ince petitioner's rule is invalid under the usual presumptions, we must disagree with the Tenth Circuit [in *St. John's*] and enforce the Board's decision in this case." (footnotes deleted) 564 F.2d at 216. The court also noted that the opinion was circulated among all judges in regular active service and that a majority of the active members "did not vote to grant that this conflict with the Tenth Circuit be reheard *en banc*. Judges Pell, Tone and Bauer voted to grant that this matter be reheard *en banc*." 564 F.2d at 216 n.8.

The District of Columbia Circuit also recently rejected the Board's *St. John's* decision. In *Baylor Univ. Medical Center v. NLRB*, ____ F.2d ____, Dkt. No. 76-1940 (D.C. Cir. Feb. 14, 1978), *BNA Daily Labor Report*, No. 33, Feb. 16, 1978 at D-1, the court denied enforcement of the Board's order based on its finding that the Medical Center's no-solicitation/distribution rule was overly broad in violation of

Section 8(a)(1) of the Act. That rule, like the one in the case at bar, essentially prohibited solicitation and distribution in any area to which patients and the public had access. The District of Columbia Circuit did not cite the Seventh Circuit opinion below. It did, however, expressly reject the Board's *St. John's* holding and approve the reasoning of the Tenth Circuit in that case. The District of Columbia court stated:

> "The Hearing Examiner evidently felt compelled to limit Baylor's proscriptions on solicitation as he did because of the Board's recent decision in *St. John's* . . . . We agree with the Tenth Circuit that even were it possible - which it manifestly is not - to determine with any confidence and rationality which areas in a hospital are and which are not 'immediately' involved in patient care, the Board's overly restrictive position on the valid extent of no-solicitation rules in medical facilities must nevertheless be overturned as insensitive both to the unique conditions found in an acute general hospital and to the declared intent of Congress."BNA *Daily Labor Report*, No. 33 at D-2 (Feb. 16, 1978). (citations and footnotes omitted).

It is apparent, therefore, that the opinion of the District of Columbia Circuit conflicts with the opinion below. The District of Columbia opinion expressly adopted the reasoning of the Tenth Circuit in *St. John's* while the Seventh Circuit opinion below expressly rejected it.[1]

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[1] While the Medical Center did introduce evidence relating to noise and overcrowding in the hallways to support its rule, it appears that the District of Columbia court would have reached the same result even without such evidence. The court stated:

> "It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging

(Footnote continued)

Traditionally this Court has exercised its discretionary jurisdiction to resolve conflicts such as those which now exist between the courts of appeal. Petitioner respectfully requests that this Court do so in this case so as to settle with certainty this significant issue of labor law which affects the nation's health care institutions, their patients and employees.

2. THIS COURT HAS GRANTED CERTIORARI IN A CASE YET TO BE HEARD ON ORAL ARGUMENT WHICH ON ITS FACTS PRESENTS ONLY A PORTION OF THE COMPLETE ISSUE OF THE PERMISSIBLE SCOPE OF NO - SOLICITATION / DISTRIBUTION RULES ISSUED BY HEALTH CARE INSTITUTIONS; THE CASE AT BAR, ON THE OTHER HAND, FACTUALLY RAISES THE ENTIRE ISSUE.

This Court recently granted the petition for certiorari filed in *NLRB v. Beth Israel Hospital,* 554 F.2d 477 (1st Cir. 1977), cert. granted, No. 77-152, 46 U.S.L.W. 3446 (Jan. 17, 1978).

Both *Beth Israel* and the case at bar raise the issue of the permissible scope of no-solicitation/distribution rules in health care institutions. Both cases turned on the willingness of the respective courts of appeal to give judicial approval to the Board's *St. John's* decision. The cases are distinguishable, however, in that *Beth Israel* factually is limited to a narrower aspect of the issue than is the case at bar. In *Beth Israel,* the Board's complaint challenged only the validity of that portion of the no-solicitation/distribution rule which applied to the cafeteria and coffee shop. The First Circuit, therefore, carefully limited its opinion:

(Footnote 1 continued)

> assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule." BNA *Daily Labor Report,* No. 33 at D-4 (Feb. 16, 1978).

> "We thus make plain that we interpret the Board's decision and order as adjudicating no more than the status of the cafeteria and coffee shop." 554 F.2d at 482.

This difference with *Beth Israel* also was noted by the Seventh Circuit when it stated:

> "In this case, unlike *Beth Israel,* the full scope of *St. John's* was called into question because petitioner prohibited solicitation and distribution in all areas to which the public and patients have access. Therefore, we are unable to confine our holding to locations such as cafeterias and coffee shops." 564 F.2d at 216.

As this Court recognized by its grant of certiorari in *Beth Israel,* the permissible scope of no-solicitation/distribution rules in health care institutions is a matter of significant concern in the administration of the nation's labor laws. However, many institutions, including the Hospital, have issued rules regulating solicitation and distribution which apply in areas of the institution in addition to the cafeteria and coffee shop. Indeed, a review of the rules described in the recent cases indicates quite clearly that the typical no-solicitation/distribution rule applies at least to all places in the institution to which patients and visitors have access. *See, e.g. Baylor Univ. Medical Center v. NLRB, supra; St. John's Hospital and School of Nursing, Inc. v. NLRB, supra; NLRB v. Beth Israel Hospital, supra; NLRB v. Summit Nursing Convalescent Home,* 472 F.2d 1380 (6th Cir. 1973); *A.T. & S.F. Mem. Hosp., Inc.,* 234 NLRB No. 65, 97 LRRM 1314 (1978); *St. Peter's Medical Center,* 223 NLRB 1022 (1976); *Baptist Hospital, Inc.,* 223 NLRB 344 (1976), *rvw. pending,* (6th Cir.) No. 76-1675. All these rules are presumed invalid under the Board's *St. John's* holding.

A decision by this Court in *Beth Israel* will not necessarily resolve fully the issue of the permissible scope of no-solicitation/distribution rules. As indicated, *Beth Israel* factually is limited to the validity of a ban on solicitation and distribution in a cafeteria and coffee shop. The case, therefore, does not bring before this Court a key concept in the Board's *St. John's* opinion, that is, what are "immediate patient care areas"? According to the Board, solicitation and distribution which otherwise would have to be permitted can be prohibited in immediate patient care areas. As discussed *infra,* at page 15, none of the courts of appeal which reviewed the Board's *St. John's* holding - including the court below - could define which areas were "immediate patient care areas" and which were not. This ambiguity is a major failing in the Board's ruling. However, despite this difficulty of definition, a strong argument can be made that *Beth Israel's* cafeteria and coffee shop were not "immediate patient care areas." Thus, *Beth Israel* could be limited to its facts in accordance with traditional judicial principles, in which event this key aspect of the *St. John's* decision would not be reached. On the other hand, the case at bar presents this Court with an opportunity to rule definitively on the entire scope of the Board's *St. John's* ruling and thereby bring stability to this unsettled area of the law.

3. THE BOARD'S RULING IN ST. JOHN'S PRESENTS A NUMBER OF SIGNIFICANT ISSUES IN THE ADMINISTRATION OF THE NATION'S LABOR LAWS.

The scope of no-solicitation/distribution rules which is permissible under the Act is an issue of recent origin. Voluntary, nonprofit health care institutions were not covered by the Act until 1974. Pub. L. No. 93-360, 88 Stat. 395. As a result of this extension of the Act, many health care institutions, including the Hospital, reviewed their personnel policies and practices to insure that they were in compliance with the newly applicable legal principles. A major area of concern was solicitation and distribution. Because of their

status as eleemosynary institutions, many hospitals historically permitted on-premises charitable solicitations. Often these drives raised funds for the hospital and related services. Acting out of a concern for their patients, however, these same institutions frequently banned other types of direct solicitation and distribution especially where patients and visitors were present. This potential conflict with the traditional no-solicitation/distribution rules developed by the Board did not go unnoticed. The periodicals soon contained articles analyzing the problem and making suggestions for compliance with the law in light of the special circumstances existing in health care institutions. One such suggestion was that health care institutions develop no-solicitation/distribution rules similar to that issued by the Hospital. *See,* e.g., R. Epstein, "Guide to NLRB Rules on Solicitation and Distribution," 49 *Hospitals, J.A.H.A.* 43 (1975); W. Emanuel & A. Klein, "Solicitation Rules Will Need Revision," *Id.* at 47.

The response of the Hospital to these legal developments probably was typical. Its rule is a carefully drafted effort to protect the statutory rights of its employees to freely and effectively engage in self-organizational activities while at the same time recognizing that the Hospital is a special work place. Unlike any factory, office, or other commercial establishment, the Hospital is engaged in the treatment of sick people. Their care is the Hospital's *raison d'etre.* Therefore, solicitation and distribution of any kind - not just union activity - is not permitted in those areas where patients and their visitors are present.

The conclusion of the court below that the Hospital's rule was unlawful was based upon the following two *assumptions* about the nature of a hospital, its employees and patients: (1) Hospital employees do not act in their professional capacities except when they are in immediate patient care areas; and (2) Patients and visitors do not expect employees who are not in an immediate patient care area to act in a professional manner. According to the court:

> "[T]he primary function of a hospital is to provide health care, and the areas of a hospital outside of immediate patient care areas are *by definition* not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity." 564 F.2d at 214 (emphasis added) (footnotes deleted).

The opinion below cited no authority for its highly questionable "definition." To the contrary, there was no support in the record for those assumptions nor did the Board in *St. John's* have any such supporting evidence. The assumptions, furthermore, do not comport with common experience.

The Seventh Circuit ruled that the Hospital must allow solicitation and distribution in such areas as the hallways and small sitting lounges in the patient wards and the lounge in which family members await the results of surgery and have post-operative discussions with the surgeon. This result is mandated, according to the court below, because when Hospital employees are in those areas they are not acting in their "professional capacities" and patients and visitors would not expect the employees to be so engaged. This conclusion follows because those areas are not immediate patient care areas and, by "definition," are neither locations where the Hospital's primary function is carried out nor where the public deals with employees in their professional capacities. Thus, according to the court, if a patient were sitting in a lounge in the patient ward next to her room, her expectation would be that nurses she encountered therein would *not* be on duty and would *not* treat her in a professional manner. Similarly, if the family of a patient undergoing open heart surgery were awaiting the results in the special lounge provided by the Hospital for such occasions, employees who were in the lounge would not be engaged in their professional capacities nor would the family members expect them to be so engaged. In both places, employees could be engaged in a heated discussion about union organization and, according to the court, neither the patient nor the family members would be justified in looking askance at such activity. Indeed, they

should be told that such activity has the stamp of approval of the Board and the Seventh Circuit.[2]

To arrive at this odd result, the Board, with the approval of the court below, had to ignore two important lines of existing precedent. First, prior to 1974, the Board had concluded that proprietary health care institutions (which already were subject to the Act) were sufficiently different from other businesses so as to warrant special consideration with respect to the permissible scope of no-solicitation/distribution rules. In *Guyan Valley Hospital, Inc.*, 198 NLRB 107 (1972), the Trial Examiner, in an opinion adopted by the Board, upheld a no-solicitation rule which was otherwise presumptively invalid simply because of the special circumstances present in a hospital. Nevertheless, the Board abandoned this precedent, without explanation, after the 1974 amendments.[3]

Second, prior to the 1974 amendments, the Board had well-established rules relating to the permissible scope of no-solicitation/distribution rules in retail stores and restaurants.

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[2] No claim could be made that the Hospital's rule did not permit its employees to engage in the free and robust exercise of their Section 7 right to organize. It was stipulated that the Hospital provides lockers to all employees and most use them on a daily basis. Three to four hundred Hospital employees utilized the main cafeteria each day. Lounge and break areas exist on almost every floor of the Hospital. Solicitation and distribution are permitted in all these areas. Solicitation also is allowed in all work areas where patients and visitors are not allowed as well as in the parking lots and Hospital grounds. Thus, it is obvious that each employee could freely solicit and distribute literature and be solicited and receive literature a number of times each day.

[3] Before the Tenth Circuit in *St. John's,* the Board conceded that *NLRB v. Summit Nursing Convalescent Home,* 472 F.2d 1380 (6th Cir. 1973), upholding a rule prohibiting solicitation and distribution in all public and patient access areas, and *Guyan Valley* accurately represented the state of the law prior to the 1974 amendments. 557 F.2d at 1374.

In both instances, employers were accorded greater leeway in terms of the permissible scope of such rules than were employers who operated factories and other types of commercial establishments. *See, e.g., May Dept. Stores Co.*, 59 NLRB 976, modified and enforced, 154 F.2d 533, cert. denied 329 U.S. 725 (1946); *Marshall Field & Co.*, 98 NLRB 88, modified and enforced, 200 F.2d 375 (7th Cir. 1953). *Goldblatt Bros., Inc.*, 77 NLRB 1262 (1948); *McDonald's Corp.*, 205 NLRB 404 (1973). The reason for these holdings was to protect the employer's interest in not exposing customers to potentially disturbing union solicitation.

Once again, the Board failed to follow these precedents in the case of public cafeterias and gift shops located in health care institutions. The Board simply asserted that these precedents were no longer applicable because it now concluded that the main function of a store is selling while the basic function of a health care institution is patient care. *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB at 1150-51 n.3.

The Board's *St. John's* holding and the opinion below are based on false assumptions about the nature of health care institutions and they represent an unexplained departure from existing precedents. They also raise other significant issues in the administration of the Act. For example, the Board distinguished between the medical characteristics of patients in "strictly patient care areas" and those in "patient access areas" such as cafeterias and lounges. According to the Board, union solicitation "might be unsettling" to the former and therefore could be banned. However, as to the latter group, the Board concluded:

> "[W]e do not perceive how patients would be affected adversely by such activities. On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation." 222 NLRB at 1150, 1151.

The Board's conclusions about the medical characteristics of ambulatory and nonambulatory patients was not based on any record evidence and is a medical judgment clearly outside the Board's traditional area of expertise. To allow the Board to make such medical judgments would set a dangerous precedent. As the Tenth Circuit noted:

> "We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were not drawn from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emotional conditions of hospital patients-areas outside the Board's acknowledged field of expertise in labor management relations." 557 F.2d at 1373.

Another significant issue presented by the Board's *St. John's* decision and the decision below involves the workability of the dichotomy between "immediate patient care areas" and other working areas in a health care institution. The practicality of this rule is open to serious question. The court in ***Beth Israel*** noted:

> "We would add that a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by a nurse's desk on a floor where patients reside be a 'patient-care area?' Would a waiting room in the emergency ward?" 554 F.2d at 482-83 n.6.[4]

The majority opinion below attempted to meet this problem by inviting the health care institutions of this nation and

[4] Similarly, the Tenth Circuit described the distinction as "difficult of application at best. . . ." 557 F.2d at 1373 while the District of Columbia Circuit called it "manifestly" impossible to distinguish the two categories. BNA *Daily Labor Report*, No. 33 at D-2. Judge Jameson in his concurring opinion below expressed similar reservations.

the Board to engage in litigation to clarify the issue. According to the court below:

> "[T]his clarifying process can take place under the rubric of the Board's decision in *St. John's* as future litigation fleshes out a definition of 'immediate patient care areas.'" 564 F.2d at 216.

In view of the workload problems of the Board as expressed in recent congressional testimony on H.R. 8410 and S. 1883 (the labor law reform bill)[5] and the all-too-well known backlog in the courts of appeal, this invitation to the health care industry and the Board to engage in protracted litigation is startling.

In enacting the 1974 health care amendments to the Act, Congress was well aware of the uniqueness of health care institutions and that their special problems mandated that a different approach be taken in the application of the Act than had been taken in other industries. For example, Senate Report 93-766 contains a number of examples of the congressional awareness of the uniqueness of the health care industry:

> "In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act. . .
>
> * * *
>
> Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions. There was a recognized concern for the need to avoid disruption of patient care wherever possible." 1974 *U.S. Code Cong. & Ad. News,* 3946, 3948, 3951.

5 *See, e.g.,* 1 BNA Labor Relations Rept. 96 LRR 225-26 (Nov. 21, 1977) (Remarks of Chmn. Fanning).

The Board has argued that the only concern of Congress related to the prevention of disruptions that would be caused by actual strikes or picketing. However, this argument was rejected by the Tenth and District of Columbia Circuits. For example, the District of Columbia court stated:

> "[W]e find no support for such a narrow reading of the congressional purpose. On the other hand, the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance between preventing possible sources of disruptions in hospitals and protecting employees' right to organize." *Baylor Univ. Medical Center v. NLRB,* BNA *Daily Labor Report,* No. 33 at D-3 (Feb. 16, 1978).

The decision below and the Board's *St. John's* ruling fail to give proper recognition to the expressed congressional concern for the well-being of hospital patients. Rather, they can and will expose patients to the turmoil which frequently accompanies union organizational activity. This would be a clear defeat of congressional intent.

CONCLUSION

The issue of the permissible scope of no-solicitation/distribution rules in the health care industry is one of singular importance in the administration of the national labor laws. The Board's *St. John's* holding and that of the court below highlight several of the significant aspects of this issue. Those decisions, which represent a sharp and unexplained departure from pre-1974 precedents, clearly are at odds with the congressional purpose of recognizing the special needs of patients in health care institutions in the application of the Act. The Board's decision and that of the court below also represent an extremely unsettling and unprecedented venture by the Board into the area of medical judgments. Finally, both decisions exalt as a rule of law an unworkable distinction between "immediate" and other "patient care areas" which, as even the court below acknowledged, will require protracted litigation to settle.

Petitioners pray that a writ of certorari be granted to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

DATED: March 10, 1978.

Respectfully submitted,

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Appendix A.

Relevant Statutes.

United States Code, Title 29:

§ 152 — Definitions.

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> • • •
>
> (14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157 — Right of employees as to organization, collective bargaining, etc.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or

all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158 — Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Appendix B.

LUTHERAN HOSPITAL OF MILWAUKEE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 76-1688.

United States Court of Appeals,
Seventh Circuit.

Argued April 6, 1977.
Decided Oct. 5, 1977.

Before SWYGERT and SPRECHER, Circuit Judges, and JAMESON, Senior District Judge.[1]

SWYGERT, Circuit Judge.

In this case petitioner Lutheran Hospital of Milwaukee, Inc. seeks review of a decision by the National Labor Relations Board ("the Board"). The Board found that petitioner violated section 8(a)(1) of the National Labor Relations Act by: (1) interrogating employees about union activities; (2) sending a letter to all employees which had the effect of inviting them to report union organizational activities to the hospital's personnel director; and (3) maintaining a rule prohibiting employees from soliciting union support or distributing union literature in all areas of the hospital to which patients and visitors have access. We hold that petitioner's interrogation of employees did not constitute an unfair labor practice, but we otherwise grant enforcement of the Board's order.

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1. The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

I

Petitioner is a nonprofit 425-bed general hospital located in Milwaukee, Wisconsin which employs approximately 850 workers. On September 30, 1974, Local 1199W of the National Union of Hospital and Health Care Employees RWDSU AFL--CIO ("the union") began an effort to organize 450 to 500 of the hospital employees. The organizational campaign continued through the succeeding months.

The union filed two complaints against petitioner with the Board, contending that petitioner had committed a number of unfair labor practices during the course of the organizational campaign. The two complaints were heard on a consolidated record before an administrative law judge, who reached a decision and issued an order on February 27, 1976. The Board affirmed the administrative law judge's decision on May 27, 1976. 224 N.L.R.B. No. 36.

Petitioner now seeks review of the Board's decision insofar as it held that petitioner violated section 8(a)(1). [2] It

2. Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), provides:

> (a) It shall be an unfair labor practice for an employer——
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

29 U.S.C. § 157, which is section 7 of the Act, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 185(a)(3) of this title.

does not dispute the administrative law judge's findings of fact, but contends that the judge and the Board drew erroneous conclusions on the basis of those findings. We shall state the facts as they become relevant to our review of the Board's decision.

II

The administrative law judge found that the interrogation of employees by supervisors constituted unfair labor practices in two cases.

In the early part of December 1974, Maryanne Krenke, a surgical technician and a member of the union's organizing committee, was on a break in the hospital's coffee room. She was drinking coffee with Housekeeping Supervisor William Fisher, which she frequently did. In the course of a social conversation, Fisher, who was not Krenke's supervisor, asked her whether she had attended a union meeting held earlier that day or whether a union meeting had been held that day. Krenke replied that she did not know if there had been such a meeting, although one had actually been held. Fisher then asked Krenke how many cards were signed, how many employees were involved in the union, and when an election would be held. When Krenke replied that she did not know the answers to those questions, Fisher remarked that it could not be a good union if she did not know anything about it. This evoked Krenke's response that, as he was a supervisor, she could not discuss union matters with him, and that federal law prohibited him from questioning her about the union. Fisher thereafter refrained from asking Krenke questions about the union.

The administrative law judge concluded that Fisher's interrogation of Krenke violated section 8(a)(1) because Fisher neither explained the need for such information to Krenke nor minimized the coercive impact of the questioning by giving Krenke assurance that reprisals would not be taken for employee involvement in the union.

Again in December 1974, Ward Clerk Marion Jackson was bringing some papers to the labor and delivery room when she met Nursing Supervisor Francis Krupo. Krupo, apparently referring to the union's organizing committee, asked Jackson: "Who was [the] head of the committee?" Jackson replied that she did not know what committee Krupo was talking about. Krupo then stated that he thought she knew, ending the conversation.

The administrative law judge found that Krupo's inquiry violated section 8(a)(1). He concluded that Jackson might well have drawn the inference that the identity of the leader of the organizing committee would be used to undermine the organizational campaign, particularly because Krupo gave no reason why he wanted the information and there was no evidence demonstrating a legitimate need for it.

[1] We cannot agree with the administrative law judge's conclusions with respect to either incident. This court has held on a number of occasions that an employer's interrogation of an employee will not violate section 8(a)(1) unless the questions asked, viewed in context, would reasonably induce in the employee the fear of reprisal or the anticipation of a reward. *NLRB v. Sachs*, 503 F.2d 1229, 1235 (7th Cir. 1975); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1115 (7th Cir. 1973); *Utrad Corp. v. NLRB*, 454 F.2d 520, 525 (7th Cir. 1972). *Sax v. NLRB*, 171 F.2d 769, 772 (7th Cir. 1948). In examining the employer's conduct to determine whether this test was satisfied, we have noted that "courts have not considered isolated remarks or questions, which did not in themselves contain threats or promises, and where there was no pattern or background of union hostility, as coercion of the employees and as a violation of Section 8(a)(1)." *John S. Barnes Corp. v. NLRB*, 190 F.2d 127, 130 (7th Cir. 1951).

[2] We are convinced that neither Krenke nor Jackson should have feared reprisal for union activities as a consequence of the questions that were asked of them. First, neither Fisher nor Krupo made threats or promises about what would happen if an employee participated in the union's organizational campaign. Second, in each case the questioner was not the supervisor of the questioned employee and therefore was not in a position to immediately discipline the employee. Third, there was no evidence that either employee had reason to believe that the supervisor questioning her had authority to speak for the hospital. *See Utrad Corp.*, 454 F.2d at 524. Finally, the record does not show that any antiunion animus contained in the supervisors' questions was part of a pattern of hostility by petitioner toward the union. Instead, the questions appear to have been isolated remarks. Fisher stopped asking questions when Krenke asked him to do so, and never broached the subject again. Krupo did not pursue his interrogation of Jackson but instead went on his way without waiting for an answer to his question. The isolated character of both incidents reinforces our conviction that they were not coercive within the meaning the section 8(a)(1).

III

[3] The administrative law judge also found that a letter sent by the hospital's personnel director to all of its employees on January 30, 1975 violated section 8(a)(1). The letter stated:

> TO ALL EMPLOYEES:
>
> A number of employees have reported that they are being pressured to sign Union cards. Some are told that they will have to join a Union if they want to continue to work here.
>
> You should know that——
>
> ——No one will have to join a Union as a condition of employment at the Hospital.
> ——No one will have to pay dues to a Union as a condition of employment at the Hospital.

——The Hospital will continue to pay wages and benefits that compare favorabably with those of any other hospital in the Milwaukee area, regardless of Union or non-Union affiliation.
——You don't have to put up with pestering or pressure to join.

Please let me know if you are bothered. I will do my best to see that the law is observed.

The director testified that he sent the letter because fifteen or twenty employees stopped him in the hallway and complained that unidentified "people out on the sidewalk" were forcing union literature and cards on them, and that they resented being pressured. He further testified that, although he suggested to the complaining employees that they tell those "people" to leave them alone, the employees insisted that the hospital reply to the union's leaflets, take a position with respect to the union, tell the union organizers to stop bothering employees, and advise the employees of their rights.

The administrative law judge concluded that the letter was an invitation to employees to report union solicitation by fellow employees to the director. He found that petitioner's "declared interest in being informed of the identity of union solicitors can reasonably be expected to instill fear in employees of the consequences of union advocacy and thereby deter and restrain them for exercising their statutory rights." He rejected petitioner's explanation for sending the letter, noting that no complaining employee testified about an unhappy experience with the "people on the sidewalk" and that petitioner had not shown a legitimate need for the information sought in the letter.

We enforce this aspect of the Board's decision. We agree with the administrative law judge that the letter, which was

sent by an official who clearly represented the hospital's management, invited employees to report the names of union organizers to the director. The letter in no way distinguished between organizing activities that are statutorily protected and conduct that is illegal in asking employees to report cases of "pestering or pressure to join." It would have been reasonable for an employee who received the letter to draw the inference that any organizational activity on behalf of the union would be reported to the director and that the identified participants in the organizational campaign would be punished.

The explanation which petitioner offers for sending the letter——that it was in response to the request of complaining employees——does not justify the coercive effect which the letter produced. First, the absence of testimony from complaining employees that they had been bothered by illegal union activity undermines petitioner's argument that it had to act to protect its employees' rights. Second, even if the petitioner had a responsiblity to protect its employees from being illegally coerced by the union while walking on the sidewalks, it could have taken whatever steps "to see that the law is observed" that it intended to pursue immediately upon receiving the complaints. In our judgment the purpose of the letter was to intimidate potential participants in the organizational campaign rather than to protect the rights of the employees, and it therefore constituted an unfair labor practice.

IV

Finally, the administrative law judge concluded that petitioner violated section 8(a)(1) by promulgating the following rule on April 25, 1975:

During working hours, employees should not solicit or distribute written matter for any purpose in any part of the hospital during working time. ("Working time" applies not only to the employee *doing* the soliciting, but includes the person *being*

> solicited.) During the nonworking time of employees' working hours, solicitation is permitted only in non-patient and in non-public areas of the hospital, and distribution of written material is limited to non-work areas and non-patient areas and non-public areas. (Emphasis in original.)[3]

The administrative law judge found that the rule was void for vagueness because it did "not describe with sufficient clarity the particular areas where employees may or may not engage in union solicitation and distribution during their non-working time." Since the rule was impermissibly vague, he reasoned, it deterred employees from exercising their organizational rights because they feared that they would unwittingly commit violations. The judge alternatively held that the rule was invalid apart from problems of ambiguity because it imposed "restrictions on union solicitation and distribution during an employee's non-working time and in nonwork areas beyond those normally permissible under established law." He recognized that a broad prohibition of solicitation and distribution might be valid under special circumstances——if solicitation and distribution in the areas in question would interfere with hospital operations or adversely affect patient care——but found that petitioner had failed to demonstrate that these special circumstances were present.

[4] On appeal both parties have dealt primarily with the validity of the second conclusion reached by the administrative law judge——that the rule was an impermissibly broad prohibition of solicitation and distribution——rather than with the judge's initial holding that the rule was void for vagueness. Since the Board affirmed all of the judge's conclusions, however, we must first decide whether the rule is too vague to be understood before examining its substantive scope.

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3. The quoted language is the second paragraph of a rule entitled "Solicitation & Distribution of Material" which was printed in the employee handbook. The first paragraph of the rule is not relevant to this case.

We do not find the language of the rule to be so ambiguous that its promulgation constituted a violation of section 8(a)(1). In most cases an employee would be able to discern whether a given location was a "public area" or a "patient area" and would therefore know whether solicitation or distribution was permitted. And although there might be borderline cases where the applicability of the rule was uncertain, we are convinced that the number of these uncertain situations would be small enough that the rule would not significantly deter employees from exercising their organizational rights for fear of unwittingly defying the hospital's policy.

We therefore turn to a determination of whether the rule's scope violates the statute. In affirming the findings and conclusions of the administrative law judge, the Board added in a footnote:

> Subsequent to the Administrative Law Judge's Decision in this case, the Board, in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182 (1976), held that a no-solicitation, no-distribution rule which prohibits all solicitation and distribution in all areas to which patients and visitors have access, other than immediate patient care areas, is unlawful. Accordingly, we find, in agreement with the Administrative Law Judge, that the Respondent herein violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation, no-distribution rule which prohibits all solicitation and distribution during an employee's non-working time in all nonwork areas where visitors of the public might be present. 224 NLRB No. 36, at 176.

Both petitioner and the General Counsel for the Board agree that the outcome of this part of the case at bar turns on whether we accept the Board's holding in *St. John's*, which is the leading case in this area and was a unanimous decision by

the entire Board. Since the rule promulgated by the employer-hospital in *St. John's* was virtually identical to the rule at issue here, [4] we shall treat the Board's reasoning in *St. John's* as directly applicable to this case.

In *St. John's* the Board began its analysis by stating the general rule that an employer may not prohibit solicitation of union support during nonworking time or distribution of union literature during nonworking time in nonworking areas. The general rule is applicable unless an employer affirmatively demonstrates that special circumstances require greater restrictions. *See P.R. Mallory & Co. v. NLRB*, 389 F.2d 704, 709-10 (7th Cir. 1967); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Since the hospital's rule, in prohibiting solicitation and distribution in areas to which patients and visitors had access, limited solicitation during nonworking time and distribution during nonworking time in nonworking areas, it was presumptively unlawful.

The Board then recognized that the hospital was justified in imposing more stringent limitations on solicitation than are generally permitted because a hospital requires a tranquil atmosphere in order to carry out its primary function of patient care. The Board therefore found that the prohibition of solicitation in strictly patient care areas, such as patients' rooms, operating rooms, and places where patients receive treatment, was justified because patients in those areas require quiet and peace of mind.

The Board also found, however, that the hospital's restrictions on solicitation and distribution in areas to which patients and visitors have access, but which are not immediate patient care areas, were not similarly justified. It reasoned that the possibility of a disruption in patient care resulting from the exposure of visitors to solicitation and

4. The only difference between the two cases is that in *St. John's* the hospital prohibited solicitation in employee-only working areas as well as in areas to which the public and patients have had access.

distribution would be remote. It further held that patients would not be adversely affected by solicitation and distribution in areas such as cafeterias and lounges and that, in any case, the interests of patients well enough to frequent such areas were outweighed by the interests of employees in discussing union representation.

The Court of Appeals for the Tenth Circuit has recently denied enforcement of the Board's decision. *St. John's Hospital & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368 (10th Cir. 1977). The court refused to accept the Board's distinction between patients who are well enough to visit such areas as cafeterias and lounges and other patients, holding that there was no evidence that ambulatory patients are better able to withstand the unsettling effects of solicitation than patients who are confined to their rooms. It also rejected the Board's basic dichotomy between immediate patient care areas and other areas to which patients have access on the ground that "it is unreasonable to conclude that [the] adverse effects of union solicitation will occur in some patient access areas but not in others." Finally, it stated as an alternative holding that the hospital had the right to prohibit solicitation and distribution in areas such as cafeterias and gift shops, which are not directly related to the function of patient care, because a cafeteria or a gift shop which was not part of a hospital would have the right to prohibit organizational activities in locations to which the public had access.

The petitioner in this case mounts its primary challenge to the Board's decision on the basis of the argument which the Tenth Circuit in *St. John's* accepted as an alternative holding: that the Board may not place greater restrictions on hospitals than it places on retail stores and restaurants. As petitioner notes, the Board has for many years permitted department stores to prohibit solicitation on the selling floor and in other public areas at any time. *Marshall Field & Co.*, 98 NLRB 88 (1952), *modified and enforced*, 200 F.2d 375 (7th Cir. 1953); *May Department Stores Co.*, 59 NLRB 976

(1944), *modified and enforced*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725, 67 S.Ct. 72, 91 L.Ed. 627 (1946). The Board has more recently allowed restaurants to prohibit solicitation and distribution in areas with which the public regularly comes into contact. *Marriott Corp.*, 223 NLRB No. 141 (1976); *McDonald's Corp.*, 205 NLRB 404 (1973). The rationale for the relaxation of the presumptions which the Board applies to the ordinary workplace is that in retail stores or restaurants the rancor which may accompany solicitation and distribution might destroy the employer's rapport with its customers, causing a serious disruption of its business.

Petitioner argues that there is no reason to suppose that a patient or a visitor in a hospital would be any less upset by the controversy which can surround a discussion of whether employees should form a union than a member of the public in a retail store or a restaurant. It contends that the special circumstances in retail stores and restaurants which rebut the ordinary presumptions with respect to solicitation and distribution are equally present in a hospital, and that the Board's distinction between the two settings is wholly arbitrary. In support of this reasoning, it points out that prior to *St. John's* the Board rejected such a distinction and permitted hospitals to prohibit solicitation and distribution in public areas. *See Shorewood Manor Nursing Home*, 217 NLRB 55 (1975); *Guyan Valley Hospital, Inc.*, 198 NLRB 107 (1972).

In our judgment the distinction the Board has now drawn between hospitals and retails stores or restaurants is far from arbitrary. A retail store's or a restaurant's primary function is selling merchandise. The sales floor of a store and the public area of a restaurant are where either business carries out the sale of merchandise, and are also where the public deals with the employees in their professional capacity. Thus, insofar as union organizational activities create an abnormal atmosphere on the sales floor or in public areas, they interfere with the employees' job performance and disrupt the store's or restaurant's performance of its primary function.

By contrast, the primary function of a hospital is to provide health care, and the areas of a hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity.[5] Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function.

[5] Moreover, even if we agreed with petitioner's contention that the Board's decision in *St. John's* was inconsistent with its holdings with respect to retail stores and restaurants, we would not be free to deny enforcement on this ground. It is the Board's function to determine the applicability of the National Labor Relations Act to working conditions in a particular industry in light of the special conditions present in that industry, and it is not our role to "insure an abstract and academic consistency in Board decisions" which draw distinctions between various industries. *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1228 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047, 95 S.Ct. 2665, 45 L.Ed.2d 700 (1975). *See also NLRB v. Weingarten*, 420 U.S. 251, 266, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). If the individual decision of the Board which is before us for review is supported by substantial evidence and based on correct legal reasoning, we must enforce it.

[6] Nor can we deny enforcement simply because the Board in *St. John's* reversed its previous position. The Board is free to disregard its own precedents in light of its cumulative experience and changing industrial practices. *Weingarten*, 420 U.S. at 265-67, 95 S.Ct. 959.

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5. Hospital employees who work in the cafeteria are an exception to this statement. However, they constitute only a small portion of the total number of hospital employees.

Petitioner also challenges the Board's decision in this case on the basis of the primary ground relied upon by the Tenth Circuit for denying enforcement in *St. John's*: that the Board's conclusion, that the interests of patients well enough to frequent areas such as cafeterias and lounges is outweighed by the interests of employees in those areas, is erroneous because it is based on the faulty assumption that ambulatory patients are better able to endure any unsettling effects of solicitation and distribution than patients who are confined to their rooms. We agree with petitioner and the Tenth Circuit that this distinction is unsound. In many cases ambulatory patients are far sicker than confined patients. For example, it is implausible to suppose that a person with leukemia who is able to walk to the cafeteria is better able to accept stress than a person confined to his bed with a fractured leg. Thus, if the Board's decision rested on this reasoning alone, it could not be upheld.

However, the Board also based its decision on the ground that patients in general are not adversely affected by organizational activities in areas of a hospital such as cafeterias and lounges. In our judgment this conclusion is correct. We cannot believe that patients and their visitors who are present in these areas are likely to become "unsettled" upon exposure to organizational activities conducted by employees. Labor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired.

Moreover, the Board's recognition that solicitation or distribution might be unsettling in immediate patient care areas does not undermine its holding that these activities would not be disturbing outside those locations. Solicitation or distribution might be undesirable in immediate patient care areas for two reasons. First, there is an obvious need in such areas for quiet. Since organizational activities can arouse intense emotion and create heated arguments, their prohibition, along with the prohibition of all other potentially noisy activities, is sensible. Second, these areas are the location where employees perform the function of patient care. The turmoil that could be created by solicitation or distribution might interfere with the employees' performance of their jobs, undermining the provision of that care.

But these factors are not present outside of immediate patient care areas. Patients and visitors do not require absolute quiet in cafeterias and lounges. And as we observed earlier, employees in those locations are not acting in their professional capacity,[6] so that organizational activities cannot interfere with their job performance or with the provision of patient care. Thus, a typical patient or visitor would be indifferent to solicitation or distribution conducted outside of immediate patient care areas. This is true not because a patient is "well" enough to leave his room, but because the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient.

[7] We hold that the Board's conclusion, that special circumstances rebutting its usual presumptions with respect to solicitation and distribution exist in the immediate patient care areas of a hospital but do not exist outside of those locations, is both logical and just. Since petitioner's rule is invalid under the usual presumptions,[7] we must disagree with the

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6. Again, cafeteria workers are an exception. *See* note 5 *supra*.

7. We are unpersauded by petitioner's final argument that it ought to be able to prohibit solicitation or distribution in all public areas even in the absence of special circumstances because there are a number of nonpublic areas on the hospital grounds in which these activities would be permitted. "The availability of one channel of communications does not permit the employer to block other channels without good reason." *National Steel Corp. v. NLRB*, 415 F.2d 1231, 1233-34 (6th Cir. 1969).

Tenth Circuit[8] and enforce the Board's decision in this case.

We note that the Court of Appeals for the First Circuit has also recently reviewed a Board decision based on *St. John's*. In *NLRB v. Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977), the court enforced the Board's order enjoining an employer-hospital from prohibiting distribution and severely limiting solicitation in the hospital's cafeteria and coffee shop, to which both employees and the public had access. The court concluded that the discussion of union activities in the cafeteria and coffee shop would not sufficiently upset ambulatory patients and their visitors to justify the hospital's rule. It declined, however, to approve the Board's *St. John's* doctrine with respect to all other locations to which patients and visitors have access, stating that the scope of the area in which it would be permissible for a hospital to prohibit solicitation and distribution should be determined by future litigation. 554 F.2d at 481-83.

We do not find our decision in this case to be in conflict with *Beth Isreal*. In this case, unlike *Beth Israel*, the full scope of *St. John's* was called into question because petitioner prohibited solicitation and distribution in all areas to which the public and patients have access. Therefore, we are unable to confine our holding to locations such as cafeterias and coffee shops. But we agree with the First Circuit that the rationale supporting the Board's decision in *St. John's* is strongest with respect to these areas, and that further litigation will be necessary to determine in exactly which areas of a hospital solicitation and distribution may be forbidden. In our judgment, however, this clarifying process can take place under the rubric of the Board's decision in *St. John's* as future

8. This opinion has been circulated among all judges in regular active service. A majority of the active members did not vote to grant that this conflict with the Tenth Circuit be reheard *en banc*. Judges Pell, Tone and Bauer voted to grant that this matter be reheard *en banc*.

litigation fleshes out a defintion of "immediate patient care areas." This phrase is far from being unambiguous, and it will be open to hospitals to demonstrate that a particular area is functionally given over to patient care.

The order of the Board is in part granted enforcement and in part denied enforcement.

JAMESON, District Judge, concurring.

I concur fully in Parts I, II and III of Judge Swygert's well considered opinion and in most of Part IV.

I agree that petitioner's rule limiting solicitation and distribution of materials to "non-work areas and non-patient areas and non-public areas" is overly broad. On the other hand, I think the Board's order permitting solicitation in "other than immediate patient care areas" likewise is unduly broad, if not ambiguous.

While I question the wisdom and necessity of requiring a hospital to permit solicitation in public cafeterias, lounges, and gift shops,[1] I recognize that the Board's findings and interpretation of the Act are entitled to considerable deference in light of the Board's " 'special function of applying the general provisions of the Act to the complexities of industrial life' . . . and its special competence in this field". *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266, 95 S.Ct. 959, 968 (1975), *quoting NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963).

On this basis, I agree with the holding of the First Circuit in *NLRB v. Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977),

1. Solicitation and distribution are permitted in employee locker rooms and adjoining lounges and restrooms; in the main cafeteria, utilized only by employees (from 300 to 400 a day); in employee lounge and break areas on almost every floor of the hospital; and in employee parking lots.

enforcing the Board's order enjoining the employer-hospital from prohibiting distribution and limiting solicitation in the hospital's cafeteria and coffee shop to which both employees and the public have access. The court there, however, rejected the Board's argument that the enforcement order should extend to all non-patient care areas.[2] As the court noted (Note 6):

> [A] phrase like "immediate patient-care area" is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a "patient-care area"? Would the waiting room in the emergency ward? 554 F.2d at 482-83.

In most modern hospitals there are many small visiting rooms or lounges in the vicinity of patients' bedrooms, where patients visit with relatives and friends. Are these "immediate patient-care areas"?[3]

While I would prefer a more limited enforcement of the Board's order, I concur in the court's opinion, recognizing as Judge Swygert has noted, that further litigation will be necessary to determine in exactly which areas of a hospital solicitation and distribution may be forbidden. As the court stated in *Beth Israel Hospital, supra*:

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2. The court concluded that the order of the Board "fairly obviously was intended to regulate only" the cafeteria and coffee shop.

3. As petitioner argues, it is difficult to explain "why a patient with a broken toe in the X-ray room would be adversely affected by union solicitation but a heart attack victim, sitting in the lounge talking to his wife, would not be."

> "[The Board bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique consideration that do not apply in the industrial setting with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized." 554 F.2d at 481.

FORM NLRB-4707 (5-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT coercively interrogate employees concerning employees' union sympathies and activities, meetings held by National Union of Hospital and Health Care Employees Local 1199W, RWDSU-AFL-CIO, the number of cards signed by employees for the named Union, the number of employees involved in that Union, and the identity of the head of that Union's organizing committee.

WE WILL NOT invite or request employees to report to us union solicitation by fellow employees or their other organizational activities.

WE WILL NOT promulgate, maintain in effect and enforce any rule or regulation which prohibits employees from engaging in union solicitation in the hospital during nonworking time or from engaging in the distribution of union literature in nonwork areas in the hospital, unless special circumstances and needs of the hospital require such restrictions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL forthwith rescind our rule promulgated on or about April 25, 1975 to the extent that it prohibits our employees during their nonworking time from soliciting in our hospital on behalf of a labor organization or from distributing union literature in the nonwork areas in the hospital.

LUTHERAN HOSPITAL OF MILWAUKEE, INC.

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building - 2nd Floor, 744 North 4th Street, Milwaukee, Wisconsin 53203, Telephone (414) 224-3866.

LUTHERAN HOSPITAL OF MILWAUKEE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 76-1688

United States Court of Appeals,
For the Seventh Circuit
Chicago, Illinois 60604

December 1, 1977

Before

Hon. Luther M. Swygert,
Circuit Judge

The court issued its opinion in this case on October 5, 1977; any petition for rehearing must have been filed by October 19, 1977. *See* Fed. R. App. P. 40(a); Seventh Circuit Rule 16(c). Petitioner tendered a petition for rehearing with a suggestion for rehearing in banc and filed a motion to have it filed instanter on November 25, 1977, or thirty-seven (37) days late. No previous request for an extension of time had been made. An affidavit by one of petitioner's three attorneys states that he had been ill and that "certain unusual financial conditions . . . required . . . special financial arrangements to effecuate this appeal."

Aside from the fact that petitioner's two other attorneys have not filed affidavits to excuse their apparent lack of diligence, petitioner's counsel has not shown good cause why the court should, in its discretion, enlarge the time prescribed by the applicable rules. Fed. R. App. P. 26(b). Counsel's reference to "special financial arrangements" does not explain why he failed to request an extension within the time allowed under the rules. Circuit Rule 8(a). If counsel was ill, surely co-counsel could have prepared a timely motion for extension until he had recovered. The court will not condone such lack of diligence by permitting the untimely filing of this petition for rehearing. Accordingly,

IT IS ORDERED that the petitioner's motion for leave to file its petition for rehearing in banc instanter is hereby DENIED.

IT IS FURTHER ORDERED that the motion of the American Hospital Association for leave to file a brief as amicus curiae is also hereby DENIED.

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinios 60604

Thomas F. Strubbe
Clerk
312-435-5850

December 19, 1977

Mr. Elliott Moore
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Mr. James C. Mallien
780 North Water Street
Milwaukee, Wisconsin 53202

Re: Appeal No. 76-1688 - *Lutheran Hospital of Milwaukee, Inc.*, Petitioner, vs. *National Labor Relations Board*, Respondent.

Gentlemen:

Enclosed please find a certified copy of the final judgment order entered by the court this date in the above-entitled appeal.

Sincerely,

/s/ Thomas F. Strubbe

Thomas F. Strubbe
Clerk

TFS/pnn

Enclosure

cc: George F. Squillacote, Director, Region 30, National Labor Relations Board, 2nd Floor Commerce Building, 744 North 4th Street, Milwaukee, Wisconsin 53203

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

LUTHERAN HOSPITAL OF MILWAUKEE, INC.,	)	
Petitioner,	)	
v.	)	No. 76-1688
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

JUDGMENT

Before: SWYGERT and SPRECHER, Circuit Judges, and JAMESON, Senior District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Lutheran Hospital of Milwaukee, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on May 27, 1976, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 6, 1977, and has considered the briefs and transcript of record filed in this cause. On October 5, 1977, the Court being fully advised in the premises, handed down its decision granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Lutheran Hospital of Milwaukee, Inc., of Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

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*The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

1. Cease and desist from:

(a) Inviting and requesting employees to report to it union solicitation by fellow employees or their other organizational activities.

(b) Promulgating, maintaining in effect and enforcing any rule or regulation which prohibits employees from engaging in union solicitation in the hospital during nonworking time and from engaging in the distribution of union literature in nonwork areas in the hospital, unless special circumstances and needs of the hospital require such restrictions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form join of assist National Union of Hospital and Health Care Employees Local 1199W, RWDSU-AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act. (hereinafter called the Act)

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Forthwith rescind its rule promulgated on or about April 25, 1975 to the extent that it prohibits its employees during their nonworking time from soliciting in its hospital on behalf of a labor organization or from distributing union literature in the nonwork areas in the hospital.

(b) Post at its hospital in Milwaukee, Wisconsin, the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 30, of the National Labor Relations Board (Milwaukee, Wisconsin) after being duly signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the aforesaid Regional Director, in wirting, [sic] within 20 days from the receipt of this Judgment what steps the Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED that cost be appropriately apportioned between the parties.

/s/ Luther M. Swygert

Circuit Judge, United States Court of Appeals for the Seventh Circuit

JD-123-76

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT invite or request employees to report to us union solicitation by fellow employees or their other organizational activities.

WE WILL NOT promulgate, maintain in effect and enforce any rule or regulation which prohibits employees from engaging in union solicitation in the hospital during nonworking time or from engaging in the distribution of union literature in nonwork areas in the hospital, unless special circumstances and needs of the hospital require such restrictions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL forthwith rescind our rule promulgated on or about April 23, 1975 to the extent that it prohibits our employees during their nonworking time from soliciting in our hospital on behalf of a labor organization or from distributing union literature in the nonwork areas in the hospital.

LUTHERAN HOSPITAL OF MILWAUKEE, INC.

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building - 2nd Floor, 744 North 4th Street, Milwaukee, Wisconsin 53203, Telephone (414) 224-3866.

Appendix C.

224 NLRB No. 36

JPW
D--1234
Milwaukee, Wis.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LUTHERAN HOSPITAL OF MILWAUKEE, INC.

and

Cases 30--CA--3082 and 30-CA-3267

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES LOCAL 1199W RWDSU---AFL--CIO

DECISION AND ORDER

On February 27, 1976, Administrative Law Judge Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided

to affirm the rulings, findings, [1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lutheran Hospital of Milwaukee, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. May 27, 1976.

Howard Jenkins, Jr., Member

John A. Penello, Member

Peter D. Walther, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1 Subsequent to the Administrative Law Judge's Decision in this case, the Board, in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182 (1976), held that a no-solicitation, no-distribution rule which prohibits all solicitation and distribution in all areas to which patients and visitors have access, other than immediate patient care areas, is unlawful. Accordingly, we find, in agreement with the Administrative Law Judge, that the Respondent herein violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation, no-distribution rule which prohibits all solicitation and distribution during an employee's nonworking time in all nonwork areas where visitors or the public might be present.

JD-123-76
Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LUTHERAN HOSPITAL OF MILWAUKEE, INC.,

and Cases 30-CA-3082
30-CA-3267

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES LOCAL 1199W RWDSU - AFL-CIO

James E. Ford, Esq., for the General Counsel.
Quarles & Brady, by David E. Jarvis, Esq., of Milwaukee, WI, for the Respondent.
Ms. Joanne D. Ricca, Staff Representative, of Milwaukee, WI, for the Charging Party.

DECISION

Statement of the Case

PAUL BISGYER, Administrative Law Judge: Case 30-CA-3082, with all the parties represented, was heard on June 19, 1975, in Milwaukee, Wisconsin, on the complaint of

the General Counsel issued on April 29, 1975, [1] and the answer of Lutheran Hospital of Milwaukee, Inc., herein called the Respondent. In issue is the question whether the Respondent interfered with, restrained and coerced its employees in the exercise of their self-organizational rights and thereby violated Section 8(a)(1) of the National Labor Relations Act, as amended, [2] by various acts of interrogation concerning employee union activities and sympathies; by distributing a letter among the employees soliciting information regarding the identity of other employees engaged in union activity; by discriminatorily implementing and enforcing a no-solicitation, no-distribution rule because of the advent of the Union; and by threatening an employee with discharge for distributing union literature and authorization cards in violation of that rule. At the close of the hearing, the General Counsel and the Respondent argued their position orally and subsequently filed supporting briefs.

On August 12, 1975, the Union filed another unfair labor practice against the Respondent in Case 30-CA-3267 [3] and a complaint based thereon was issued by the General

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1 The complaint in Case 30-CA-3082 is based on a charge filed on March 18, 1975 by National Union of Hospital and Health Care Employees Local 1199W, RWDSU - AFL-CIO, herein called the Union. A copy of this charge was duly served on the Respondent the next day by registered mail.

2 Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Insofar as pertinent, Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

3 A copy of this charge was served on the Respondent by registered mail on August 13, 1975.

Counsel on September 30, 1975, alleging that on or about April 25, 1975 the Respondent, in violation of Section 8(a)(1) of the Act, promulgated and maintained in force and effect an invalid no-solicitation, no-distribution rule to replace the rule involved in Case 30-CA-3082, in that the revised rule prohibits employees from participating in union activities on nonworking time in nonworking areas. In its answer, the Respondent admits the promulgation and maintenance of the revised rule but denies its illegality under the Act. On motion of the General Counsel, opposed by the Respondent, the undersigned Administrative Law Judge issued a telegraphic order on October 24, 1975, reopening the record in Case 30-CA-3082 and consolidating that proceeding and Case 30-CA-3267. [4] On January 5, 1976, the parties, in lieu of a further hearing on the newly created issue, executed a Stipulation which provides that the Stipulation, the record in Case 30-CA-3082, the pleadings in Case 30-CA-3267, and the stipulated exhibits shall constitute the entire record in the consolidated cases. The Stipulation is approved; the stipulated exhibits are received in evidence; and the consolidated record is closed. On January 30, 1976, the General Counsel and the Respondent filed additional briefs in support of their respective positions regarding the validity of the revised rule.

Upon the entire consolidated record, and from my observation of the demeanor of the witnesses, and with due consideration being given to the arguments advanced by the parties, I make the following:

Findings and Conclusions

I. The Business of the Respondent

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4 On the same date, the General Counsel's Motion for Judgment on the Pleadings was denied.

The Respondent is a nonprofit [5] Wisconsin corporation engaged in the operation of a hospital at Milwaukee, Wisconsin, and as such is and has been at all material times a "health care institution" as defined in Section 2(14) of the Act. Its annual gross revenue from its Milwaukee operation exceeds $100,000. In the conduct of its hospital, the Respondent purchases goods and supplies valued in excess of $25,000 which are shipped directly to the hospital from points outside Wisconsin.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It was stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Introduction; the Advent of the Union

The Respondent employs approximately 850 employees at its 425-bed hospital which occupies two and a half square blocks. About September 30, 1974, the Union launched a drive to organize some 450 to 500 of the Respondent's employees by distributing among them on the sidewalk in front of the entrances to the hospital during shift changes leaflets to which were attached cards to be filled out and returned to the Union if they were interested in further information. As a result of the employee response, the Union held

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5 In accordance with the Respondent's request, unopposed by the General Counsel, the record is corrected to show that the Respondent is a nonprofit institution.

its first organizational meeting on October 17, 1974 at its offices where the employees were informed of the benefits of unionization to be achieved through contract negotiations with the Respondent. Membership dues were also discussed and additional union literature was passed out. Another meeting was held a few weeks later at the Union's office at which an employee organizing committee was formed to assist in the Union's drive and the employees were instructed with respect to their statutory rights and the distribution of organizational material in the hospital during nonworking time and in nonwork areas. In furtherance of this effort, employee organizers were given at this meeting union authorization cards, fact sheets, magazines and other campaign material, which they thereafter distributed among their coworkers. Other employee meetings were subsequently held by the Union. Apparently, as of the time of the hearing in this case, the Union's campaign did not generate sufficient support to warrant filing a petition for a representation election. However, an unfair labor practice charge was filed by the Union on March 18, 1975, [6] charging the Respondent, which admittedly has been aware of the Union's drive since its inception, with engaging in unlawful conduct to impede the Union's organizational effort. We turn to a consideration of these alleged unlawful acts and the conclusions to be derived.

B. The Alleged Interference, Restraint and Coercion

1. Interrogation of Employee Krenke by Housekeeping Supervisor Fisher

In the early part of December 1974, Maryanne Krenke, a surgical technician and a member of the Union's organizing committee, was on a break in the coffee room, drinking coffee with Housekeeping Supervisor William Fisher, as she fre-

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6 Unless otherwise indicated, all dates refer to 1975.

quently did. Another female technician, Sidney Rose, was also present. In the course of a social conversation, Fisher, who was not Krenke's supervisor, asked her whether she had attended a union meeting held earlier that day or whether a union meeting had been held that day. Krenke replied that she did not know if there had been such a meeting, although one had actually been held. Continuing with his inquiries, Fisher then asked Krenke how many cards were signed; how many employees were involved in the Union; and when an election would be held. When Krenke replied that she did not know the answers to those questions, Fisher remarked that it couldn't be a good union if she did not know anything about it. This evoked Krenke's response that, as he was a supervisor, she could not discuss union matters with him, and that the Federal law prohibited him from questioning her about the Union. Fisher thereafter refrained from such conduct. [7]

I find that Fisher's interrogation of Krenke, no matter how well-intentioned, violated Section 8(a)(1) of the Act. Not only did Fisher fail to explain the need for such information to Krenke or Rose, the other employee who was present, but also he gave no assurance that reprisals would not be taken

7 The foregoing findings are based on Krenke's credible testimony, which Fisher agreed reflected "basically" what had occurred on this occasion, although he thought the incident occurred in January 1975. Fisher further testified that he asked those questions because he was "just inquisitive as a friend." Fisher also testified to an earlier episode in the coffee room in the first part of December 1974 when Krenke, in his presence, handed an employee a union card to fill out. At that time, a nonemployee stranger told Krenke that it was not right for her to solicit on "company time." Krenke, however, replied that she was on a break and that therefore her solicitation was permissible. Fisher thereupon expressed his agreement with the stranger that Krenke should not be doing this. He further testified that he, nevertheless, did not report this card incident to management because he "didn't want Mary [Krenke] to get into trouble." Clearly, the Act sanctions union solicitation on an employee's nonworking and free time in a nonwork area.

for employee involvement or interest in the Union so as to minimize the necessary coercive impact of such questioning. Indeed, Fisher himself understood how information regarding union activity could be misused by management. Thus, he testified that, when he witnessed Krenke solicit an employee to sign a union card a few weeks before and he criticized her for doing so, he nevertheless did not report her to management lest she "get into trouble," despite the fact that the solicitation had actually occurred on her free time in a nonwork area, the coffee shop, and therefore was permissible activity. Nor does the fact that the inquiries were made in the course of a friendly conversation sanitize the interrogation [8] which is otherwise prohibited by Section 8(a)(1) of the Act. [9]

2. Interrogation of employee Jackson by Nursing Supervisor Krupo

In December 1974, while Marion Jackson, a ward clerk, was bringing some papers to the labor and delivery room she met Nursing Supervisor Francis Krupo who asked her who was the head of the committee, apparently referring to the Union's organizing committee. Jackson answered that she did not know what committee Krupo was talking about. Krupo, in turn, stated that he thought she knew and on this note the conversation ended with both going their separate ways. [10] Although other employees were in this area, the conversation was evidently not overheard.

8 *Rex Disposables, Division of DHJ Industries, Inc.*, 201 NLRB 727, 730; *Monroe Manufacturing Co., Inc.*, 200 NLRB 62.

9 *C & E Stores, Inc.*, 221 NLRB No. 218, 2-3; *John H. Swisher & Son, Inc.*, 211 NLRB No. 114, JD 6-7, cf. *Murcole, Inc.*, 204 NLRB 228, 234.

10 Jackson subsequently joined the Union and the organizing committee, becoming active on its behalf.

Such an attempt to learn the identity of the leader of the organizing committee might well suggest that the inquiry was prompted by more than idle curiosity and that the information thus obtained would be improperly used to undermine the lawful exercise by employees of their organizational rights. This is particularly so here where Krupo gave no reason to Jackson why the information was sought and no evidence appears demonstrating a legitimate need for it. Accordingly, I find that Krupo's inquiry was a form of interference, restraint and coercion of an employee proscribed by Section 8(a)(1) of the Act.[11]

3. The Respondent's January 30, 1975 letter

On January 30, the Respondent distributed to employees along with their paychecks the following letter prepared and signed by Personnel Director Richard J. Torstenson:

TO ALL EMPLOYEES:

A number of employees have reported that they are being pressured to sign Union cards. Some are told that they will have to join a Union if they want to continue to work here.

You should know that --

--No one will have to join a Union as a condition of employment at the Hospital.

--No one will have to pay dues to a Union as a condition of employment at the Hospital.

--The Hospital will continue to pay wages and benefits that compare favorably with those of any other hospital in the Milwaukee area, regardless of Union or non-Union affiliation.

--You don't have to put up with pestering or pressure to join.

Please let me know if you are bothered. I will do my best to see that the law is observed.

11 *Rex Disposables, supra,* 729.

Explaining the circumstances surrounding the issuance of this letter, Torstenson testified that some 15 or 20 employees stopped him in the hallway and complained that "people out on the sidewalk," whom they did not identify by name, were forcing union literature and cards on them and that they resented being pressured. Torstenson further testified that, although he suggested to the complaining employees that they tell those "people" to leave them alone, the employees insisted that the Respondent reply to the Union's leaflets; take a position with respect to the Union; tell those "people" to leave them alone and not bother them; and advise the employees of their rights. However, no complaining employee furnished testimony at the hearing regarding their alleged unhappy experience with these "people."

There can be little doubt that in the closing paragraph of the letter the Respondent, in effect, invited employees to report to Personnel Director Torstenson union solicitation by fellow employees and their related activities, whether or not these activities occurred during their free or working time or in work or nonwork areas. Indeed, as Torstenson himself testified, this letter was prompted by employee complaints of union solicitation and distribution of union literature which union supporters engaged in on the public sidewalk in front of the hospital. Certainly, the information sought by the Respondent was broad enough to encompass employee organizational activities protected by Section 7 of the Act. Moreover, the Respondent's declared interest in being in-

formed of the identity of union solicitors can reasonably be expected to instill fear in employees of the consequences of union advocacy and thereby deter and restrain them from exercising their statutory rights. Contrary to the Respondent's contention, the fact that the Respondent euphemistically couched the conduct of union advocates in terms of pressuring, pestering and bothering employees does not render the invitation to inform on union solicitors any less coercive. Nor has the Respondent demonstrated, in justification of its action, a legitimate need for the information to prevent a disruption of hospital operations.

Accordingly, I conclude that the invitation to inform on employees indicated in the Respondent's letter to employees violated Section 8(a)(1) of the Act. [12]

4. The Respondent's alleged discriminatory enforcement of its no-solicitation, no-distribution rule; the alleged discharge threat to employee Jackson if she violated the rule

From 1967 until about April 25, 1975, when its rule was revised, [13] the Respondent had the following posted no-solicitation, no-distribution rule in effect at its hospital:

> Unauthorized distribution of literature, written or printed matter of any description in working areas on hospital premises during working time and the unauthorized solicitation or collecting of contribu-

12 *Bank of St. Louis*, 191 NLRB 669, 673, enfd. 456 F.2d 1234 (C.A. 8); *Poloron Products of Mississippi, Inc.*, 217 NLRB No. 114, JD 7.

13 The validity of the revised rule is the subject of the subsequent complaint issued in Case 30-CA-3267 and consolidated with the earlier proceeding which will be later discussed.

> tions for any purpose whatsoever is strictly prohibited according to Lutheran Hospital policy.

The complaint acknowledges the existence of that rule but does not challenge its validity. [14] Instead, it alleges that on March 14 the rule was discriminatorily implemented and enforced "because of the advent of union organizational activities," and that on that date employee Jackson was threatened with discharge if she violated the rule. Essentially, it is the General Counsel's position that the discriminatory application or enforcement of the rule is established by the fact that acts of nonunion related solicitation and distribution of literature were tolerated at the hospital, while the rule was strictly enforced against union activity, citing only the Jackson episode.

In support of this theory, the General Counsel presented the following testimony: Both during working and break

14 Because the validity of the rule is not in issue in this case, I make no comment in that regard. Also concedely not in issue in this case is the version of the rule, as set forth in the Respondent's Employment Relations Policy Manual, a copy of which is customarily given to employees at the time of their hiring. The manual makes it an offense, subject to discipline and ultimate discharge, for an employee to engage in--

> 7. Soliciting or collecting contributions for any purpose whatsoever on Hospital time.
>
> * * *
>
> 10. Distribution of literature, written or printed matter of any description on Hospital property without permission from the Personnel Director.

According to the testimony of Personnel Director Richard Torstenson, the phrase "Hospital time" means working time and the phrase "Hospital property" refers to the Hospital building itself.

time, employees have taken up money collections among themselves for employees who were sick or hospitalized or suffered a death in the family. [15] There is no evidence, however, that these collections were made in the presence of supervisors or with their knowledge or consent. In the past spring, a Sunshine Club was also formed at a unit staff meeting, chaired by Supervisor La Rose [16] for the purpose of creating a fund derived from employee contributions to be used for birthday, marriage and other gifts for employees in that unit. A notice was subsequently posted on a bulletin board to alert employees whether they were current in their contributions.

Testimony was further adduced to the effect that several employees had engaged in commercial activities. Thus, one or two employees had been taking orders for Avon products during working and free time. However, the testimony does not indicate that any supervisors were present on these occasions. There is testimony, on the other hand, that Avon catalogs were available for such purposes at various places in the hospital, including nurses' stations, and thus presumably within the knowledge of supervisory nurses stationed there. An employee testified that the last time she had seen an Avon catalog in the hospital was about 1½ months before the hearing, while another employee testified that she had noticed such booklets around the hospital between 1972 and 1974 but that she had never been asked by anyone to buy Avon products. According to Personnel Director Torstenson, when he recently learned that employee Vitalie was engaged in promoting Avon products at the hospital he directed her to stop it.

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15 Employee Jackson testified to an occasion 3 or 4 years ago when a collection was taken up by employees in her section for a gift for a supervisor who was leaving to get married.

16 However, other than her title, no evidence of La Rose's supervisory authority or duties was presented at the hearing.

In addition, there is testimony by employee Jackson that certain unidentified kitchen workers have offered for sale to employees small dolls and purses and that this witness herself had sold nuts in the hospital. Here, too, the evidence does not indicate whether this activity was observed by supervisors or whether it was engaged in during working time. Employee Krenke, a union activist, testified that the past March she had taken orders from her coworkers for Coventry Jewelry and in that connection had placed brochures and order forms in the coffee shop where she told the girls to fill out the order forms. Krenke further testified that she would pick the orders up before work or during lunch time.

Moreover, Irene Milass, a switchboard operator, whose work area is in the lowest level in the hospital building gave testimony that Beth Fohr, who had since left the Respondent's employ, had taken orders from employees for Vanda cosmetic products. However, Milass did not indicate where this occurred and whether it was on working or free time. She also testified that Vanda booklets were on a table at Milass' work location "off and on" until January or February of 1975 and that, although her supervisor, Joan Moore, [17] had a desk in that area, Moore never directed the removal of those booklets. However, it appears that the Vanda booklets were removed under unspecified circumstances at least a month after they were placed there. Milass also credibly testified that on one occasion in February or March 1975, Moore brought into the hospital some bars of candy which her son was selling in connection with a high school promotion drive for funds to purchase sports equipment and that she sold the candy to several employees. However, Milass did not observe Moore enter any other areas in the hospital to sell the candy.

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17 However, no testimony concerning Moore's duties or supervisory authority was furnished.

Another employee, Rex Hutchinson, testified to a demonstration of Amway products which a nurse conducted in March or April 1975 during working time for two or three employees in a small room used for staff conferences. This room was about 15 to 20 feet from the nurses' station where Supervisor La Rose had her desk. At the time of the demonstration, the door to the room was closed and no evidence was adduced that any supervisor was aware of it.

Other testimony was adduced that Supervisor Grobe once a year has displayed for sale on her desk several cans of candy in connection with a fund drive for American Operating Room Nurses' Association. [18] Finally, there is testimony that the Respondent itself posted a notice on the bulletin board, with copies distributed among the employees, offering used hospital furniture and other items for sale to employees.

Personnel Director Torstenson, whose function it is to enforce the no-solicitation, no-distribution rule, testified that, whenever a violation of the rule is called to the attention of the Personnel Department, the employee guilty of such conduct is directed to refrain from that activity. However, since complainants are usually reluctant to identify the violators, there have been few instances when the violator has been spoken to. One of the instances where he had spoken to an offender of the rule involved Vitalie mentioned above. Torstenson also testified that, whenever literature not pertaining to the hospital is found in the building, it is removed. In addition, Torstenson alluded to occasions when insurance agents, merchandising outlets and real estate companies have been denied lists of, and access to employees at the hospital

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18 Testimony was also adduced that about 3 years ago, an employee had sold Girl Scout cookies in the coffee shop, locker room and cafeteria during break time and that another employee at one time had brought into the coffee shop a fashion catalog and solicited orders from employees.

for solicitation purposes. Moreover, he testified to a recent incident when he ordered an employee to remove petitions she had placed at various work stations to allow the astronauts to carry a bible with them on their mission. Similar treatment was accorded to religious literature which was brought into the hospital by Seventh Day Adventists and other individuals. Torstenson also testified that he had put a halt to the sale in the hospital of tickets to charities and other events. However, he testified, the hospital permits United Fund pledge cards to be distributed among the employees once a year, and the Women's Auxiliary to post a notice on the bulletin board announcing a benefit event it was running for the hospital.

According to Torstenson, the foregoing policy has been uniformly pursued since prior to the appearance of the Union and supervisors have been under instruction to see that the rule is observed. In answer to specific questions put to him on the witness stand, he credibly testified that without contradiction that he had never heard of the Sunshine Club or the Amway demonstration until the hearing in this case; nor was he aware that any supervisor had ever violated the rule.

Except for the Jackson episode presently to be discussed, there is no evidence that the Respondent ever talked to, reprimanded or otherwise disciplined any employee for engaging in union organizational activity in violation of the hospital's no-solicitation, no-distribution rule, although it is clear that union supporters have conducted such activity during their free, nonworking time in nonwork areas such as the cafeteria, coffee shop, and other places where employees take their breaks. Indeed, Jackson, who was a member of the Union's organizing committee, admitted that on occasions other than the one in question, she also discussed the Union with employees while she and they were working under the belief that it was not against hospital policy to do so. The events leading up to the Torstenson's interview of Jackson, which is alleged to constitute a discriminatory application of the rule, are these:

On March 5, while Helen Daniels, a pharmacy technician, was stocking medical supplies in a utility room away from regular pharmacy station, a registered nurse, Eckert, who was also performing one of her duties there, asked Daniels when she had come back to her job, which she had left several years ago. Eckert then informed her of the employees' efforts to bring a union into the hospital to help them secure better working conditions. In the course of this conversation, Jackson entered the room; made some remarks which Daniels did not hear; and departed. Shortly thereafter, Jackson returned and, as Daniels was reaching into a cabinet, Jackson put two union cards in Daniels' pocket, requesting her not to say anything about this occurrence as she (Jackson) was not supposed to engage in such activity while working. Jackson thereupon left.[19]

When Daniels returned to the pharmacy, which was her official station, she reported this incident to Sister Gladys, her supervisor and director of pharmacy services and, at the latter's request, handed over the union cards she had received from Jackson. However, Daniels did not tell Sister Gladys that Jackson had put pressure on her to join the Union, nor that Jackson had warned her that she was required to join the Union to work there, which Jackson manifestly did not do. Daniels also mentioned the Eckert conversation but did not identify Eckert by name since she did not know it at the time. Subsequently, Sister Gladys relayed Daniels' report to Personnel Director Torstenson, who did not act on this information at that time.

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19 The foregoing findings reflect Daniels' testimony, which I credit. Jackson testified to a conversation she had had prior to the pharmacy incident, which will be presently discussed. It is not clear whether or not Jackson's testimony relates to the event recited in the text above. According to Jackson, at one time when Daniels came to Jackson's work area and both were working, Jackson asked her if she was interested in the Union but, as she recalled, no union literature was handed out.

The next day, March 6, while on her lunch hour, Jackson entered a small room in the pharmacy section of the hospital and, in the presence of Patricia Brusky, a staff pharmacist, handed Daniels a rolled-up union magazine containing a union card and other pieces of union literature for her to read and departed. The entire incident lasted a second or two. Clearly, the room was a work area, and whether or not Daniels was actually working at this time or only talking to Brusky,[20] Daniels was on duty and not on her own free time. After Jackson left the room, Daniels reported this incident to Sister Gladys and again, at Sister Gladys' request, gave her the union material she had received from Jackson. Daniels did not inform Sister Gladys that Jackson had forced her to take the union material.

About a week later, Torstenson, who had also been apprised by Sister Gladys of the latter incident, interviewed Daniels and Brusky concerning that occurrence and the one on March 5. Acting on the advice of the Respondent's attorney, Torstenson on or about March 14 summoned Jackson to his office.[21] He opened the interview by informing her that he had received reports that she had passed out leaflets and cards to an employee and that he did not know whether or not she was then on duty or whether this conduct occurred in a work or nonwork area or whether the employee

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20 In view of my disposition of the issues in this case, it is unnecessary to resolve the conflicting testimony in this respect.

21 Torstenson testified that for several months he had been aware of Jackson's involvement in the Union's organizational campaign, as well as the involvement of other employees, and that it is not his practice to prevent such activity so long as it is not conducted in work areas and employees are not bothered while they are working. Jackson admitted discussing the union with employees, not only in the cafeteria, snack bar, coffee shop and classroom, but also while employees were working. She, however, denied distributing union literature to employees while they were engaged in the performance of their duties.

who was given the material was working at that time. Torstenson then reminded Jackson of the Respondent's rule or policy concerning the distribution of literature of any type and solicitation which was designed to protect employees, patients and visitors from being "unduly pestered." Jackson readily admitted that she had passed out union literature but added that it was done on her own time during breaks and her lunch hour, as well as before and after work, and that she was fully aware that she was not supposed to engage in such activity during working time or in work areas. Torstenson expressed his gratitude for her comments since he had conflicting reports and he preferred giving her the benefit of any doubt. The interview ended with Torstenson pointing out that, under the Respondent's rule, the distribution of literature on an employee's working time or hours, [22] could possibly result in discharge. [23] However, Jackson was not personally reprimanded for violating the rule.

The General Counsel contends that the foregoing evidence establishes that on March 14, the Respondent

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22 The terms "working time" and "working hours" were used interchangeably by the witnesses in their testimony. However, viewing Torstenson's conversation with Jackson in its entirety, I find that Torstenson's remarks were not intended to, and did not, convey the idea that the Respondent's then current rule prohibited union solicitation during an employee's free time or that it barred the distribution of union literature in nonwork areas during nonworking time. Cf. *Essex International, Inc.*, 211 NLRB No. 112, 3-6; and *The Contract Knitter, Inc.*, 220 NLRB No. 30, 5-7.

23 The foregoing findings are based on a composite of Jackson's and Torstenson's testimony, which I find reflect what probably occurred at the interview. During this interview, Torstenson also mentioned his experiences with unions. It is unimportant to the issues here presented to determine whether Torstenson stated to Jackson that he had "come up against twelve unions" since his association with the hospital and that the unions were unable to get in, as Jackson testified, or whether Torstenson told her that he had had a good relationship with them, as he testified.

discriminatorily enforced and applied its no-solicitation, no-distribution rule because of the advent of the Union and on that occasion unlawfully threatened employee Jackson with discharge if she violated the rule. I do not agree.

As noted above, the Union initiated its organizational campaign approximately 6 months before March 14 at a time when the no-solicitation, no-distribution rule had been in existence for 7 years. During the 6-month period supporters of the Union freely and generally in a manner not prohibited by the rule engaged in union solicitation and the distribution of union literature inside and outside the hospital. Indeed, although Personnel Director Torstenson learned that Jackson had given employee Daniels union cards in a work area and the next day had handed her union material in another work area, in violation of the rule, he simply discussed the matter with her in his office, accepted her assertion that she customarily confined her union activity in the hospital to her own nonworking time and in nonwork areas and only reminded her that a violation of the rule could lead to discharge. Clearly, Jackson was not reprimanded for her conduct. In these circumstances, it can hardly be inferred that the Respondent was prompted discriminatorily to enforce the rule because of the appearance of the Union at the hospital or that it disparately applied the rule to Jackson, [24] particularly since the record is absolutely devoid of any evidence that employees were permitted to engage in antiunion activity in the hospital in disregard of the rule. [25]

The General Counsel, nevertheless, cites various instances of employee solicitation and collection of funds for nonunion related purposes which had taken place in the hospital, as described above, to support his claim of discriminatory enforcement of the rule. However, many of

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24 *Luxuray of New York Division of Beaunit Corporation*, 185 NLRB 100.

25 See *The Contract Knitter, Inc.*, *supra*, 6.

these episodes of solicitation and collection occurred during the employees' free time and in nonwork areas. Moreover, with respect to other instances of such conduct, it was not shown that supervisors were present or were aware that such activity was going on during working time or in work areas [26] or that the activity otherwise interfered with hospital routine. In the two instances where supervisors sold candy, the sales were isolated acts which were made in conjunction with an annual fund raising drive for the benefit of a high school's athletic program and a professional nurses' association. As for the formation of the Sunshine Club in the course of a staff meeting and the subsequent posting of a notice on a bulletin board regarding the employee's dues standing in that club, they certainly cannot be viewed as violations of the no-solicitation rule. Nor is it evidence of discriminatory enforcement of the Respondent's rule the fact that the Respondent itself had the occasion to post and circulate in the hospital a notice offering for sale to its employees used hospital furniture and related items. Undeniably, a no-solicitation rule, as a general proposition, is not intended to, nor does it restrict the employer from engaging in the activity encompassed by the rule. [27] Also of dubious value as evidence of discriminatory application of the rule is the fact that Respondent permitted United Fund pledge cards to be distributed among the employees once a year and the Women's Auxiliary

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26 *Serv-Air, Inc.*, 175 NLRB 801, on remand from 395 F.2d 557 (C.A. 10), where the Board noted that "even if we were persuaded that the solicitation occurred on work time, there is no evidence that the incident came to the attention of management, and hence it is no basis for a finding that Respondent permitted it without retaliatory action."

27 See *N.L.R.B. v. United Steelworkers of America, CIO (Nutone Incorporated) et al.*, 357 U.S. 357, where the Supreme Court held that it was not an unfair labor practice for an employer to enforce against employees a no-solicitation rule, in itself concedely valid, while the employer engages in coercive antiunion solicitation.

of the hospital to post on bulletin boards an announcement of a forthcoming event being run for the benefit of the hospital. [28] Such "beneficient acts fall far short of establishing forbidden discrimination." [29]

In short, all things being considered, including the size of the hospital and its employee staff, management's efforts to enforce its rule, and the absence of sufficient proof of management's deliberate toleration of nonunion related solicitations and collections on working time and in work areas, I find that the General Counsel failed to sustain his burden of establishing by a preponderance of the evidence that the Respondent's no-solicitation, no-distribution rule was discriminatorily enforced and applied against union adherents, particularly employee Jackson, in violation of Section 8(a)(1) of the Act. [30] Accordingly, the relevant allegations of the complaint in Case 30-CA-3082 will be dismissed.

5. The alleged illegality of the revised rule (Case 30-CA-3267)

The no-solicitation, no-distribution rule, which is the subject of the complaint in Case 30-CA-3267, was first posted

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28 *Serv-Air, supra; Astronautics Corporation of America*, 164 NLRB 623, 627.

29 *Serv-Air, Inc. v. N.L.R.B.*, 395 F.2d 557, 560 (C.A. 10).

30 Cf. *Serv-Air, Inc.*, 175 NLRB 801; *Astronautics, supra*, 625; *The Seng Company*, 210 NLRB 936. The cases relied upon by the General Counsel for a contrary result, such as, *Montgomery Ward & Co.*, 202 NLRB 978, 979, and *Daylin, Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB No. 40, are distinguishable from the present case in that management in those cases permitted more extensive nonunion related activities to be conducted in violation of the rule, while it prohibited union solicitation in order to impede and discourage the employees' organizational effort.

on April 25, 1975. The rule reflects a revision of an earlier rule, whose enforcement is considered in the preceding section of this Decision, and is the result of a program to revise the employee handbook entitled "Working Together" begun in July 1974. The new rule was drafted by the Respondent's counsel on the basis of his views regarding legal developments in the area of no-solicitation, no-distribution rules in the health care field. As embodied in the employee handbook, the challenged rule reads, as follows:

> Solicitation & Distribution of Material
>
> We receive numerous requests from various persons, groups and organizations to be allowed to solicit patients or employees for various causes, or be allowed to distribute books, pamphlets, etc., throughout the hospital. These are a source of annoyance to the patients, as well as disruptive to our routines. This has led us to adopt a rule prohibiting members of the public from doing any soliciting or any distributing of material on hospital premises at any time. Outside of working hours an employee becomes a member of the public, and the foregoing rules will apply.
>
> During working hours, employees should not solicit or distribute written matter for any purpose in any part of the hospital during working time. ("Working time" applies not only to the employee doing the soliciting, but includes the person being solicited.) During the non-working time of employees' working hours, solicitation is permitted only in non-patient and in non-public areas of the hospital, and distribution of written material is limited to non-work areas and non-patient areas and non-public areas. (Underlining added.)

Included in the record pursuant to the parties' Stipulation are 11 large blueprints of the Respondent's facilities on which are designated by color code the areas where employees are

allowed or not allowed, to engage in solicitation and distribution in accordance with the rule. [31]

Quoting only the underlined portion of the rule, the complaint alleges that since April 25, 1975 the Respondent interfered with the employees' statutory rights in violation of Section 8(a)(1) of the Act "by promulgating and maintaining in force and effect an invalid no-solicitation and distribution rule which prohibits employees from participating in union organizing activities on nonworking time in nonworking areas." [32] The General Counsel contends that the rule is on its face ambiguous and overly broad and therefore infringes upon the employees' organizational rights in violation of Section 8(a)(1) of the Act. The Respondent, on the other hand, urges that the validity of its revised rule may not properly be judged by the legal principles normally applicable to industrial plants. Instead, it argues that special consideration

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31 Specifically, the Stipulation provides:

> 4. Areas on the Plans which are shaded with red lines are nonwork, nonpatient and nonpublic areas in which employees are allowed to engaged (sic) in solicitation and distribution in accordance with the Rule. Patients and members of the public (including persons visiting patients) are not allowed in these areas. Areas shaded in green are work areas in which neither the public nor patients are allowed and in which employees may engage in solicitation in accordance with the Rule. Unshaded areas are either areas in which the public and/or patients are present or are unoccupied. No solicitation or distribution is allowed in the occupied areas which are unshaded.

32 Although the complaint thus challenges only a part of the rule, the General Counsel, nevertheless, argues in his brief that the first paragraph of the rule dealing with the rights of off-duty employees is also unlawful. Manifestly, that issue is not before me under the complaint and the Stipulation. In any event, the General Counsel's position is of doubtful validity. *GTE Lenkurt, Incorporated*, 204 NLRB 921.

should be given to the nature of its hospital operations, its concern with the health and welfare of its patients, and the presence of the public visiting the patients, and that the Board should therefore find, as it has done in the case of retail establishments and other health care institutions, that these factors outweigh the employees' organizational rights and justify the broad scope of the rule.

The Supreme Court has observed that the "place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." [33] In recognition of this truism, the Board with court approval, after striking a balance between the employees' organizational rights and the employer's interest in maintaining production, discipline, and safety, [34] has evolved a set of principles to govern union solicitation and the distribution of union literature by employees on their employer's premises. Thus, an employer rule prohibiting union solicitation by employees during working time is presumptively valid, [35] as is a rule prohibiting the distribution of union literature in work areas, whether or not it occurs on working time. [36] If the rules go beyond these

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33 *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, 325.

34 *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 797-798.

35 *Id.* at 803. See *Essex International, Inc.*, 211 NLRB No. 112, where the Board clarified the distinction between "working time" or "worktime" and "working hours." It held that a prohibition of solicitation or distribution during "working time" or "worktime" is valid on its face since it connotes the time spent in the actual performance of job duties and excludes the lunch and break periods, while "working hours" conveys the idea of business hours which includes the employees' free time and therefore the prohibition is presumptively invalid.

36 *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615.

limitations and ban union solicitation by the employees during their free time or prohibit their distribution of union literature in nonwork areas during their nonworking time, these rules are invalid and constitute an unreasonable impediment to the employees' exercise of their Section 7 rights violative of Section 8(a)(1) of the Act, unless the employer can demonstrate exceptional circumstances justifying such broader restrictions.

In applying the foregoing principles, the Board has been confronted with the special problems that employers operating retail enterprises experience as a result of employees coming in contact with the public in the course of their work. To avoid a possible disruption of business if employees engage in union activity in the presence of customers, the Board has sanctioned employer rules which proscribe union activity in selling areas whether or not employees are on their own free time. [37] However, the Board has declined to extend the prohibition against union solicitation by employees during their nonworking time to nonselling areas, even though customers may be present, where convincing evidence justifying such extension is not adduced. [38] In the case of hospitals and other health care institutions, the Board has similarly indicated an inclination not to apply the above principles mechanically but to approve no solicitation and distribution rules which impose additional restrictions on employees' organizational rights where unusual cir-

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37 *The May Department Stores Company*, 59 NLRB 976, 981; *Marshall Field & Co.*, 98 NLRB 88, 92; *Two Wheel Corp., d/b/a Honda of Mineola*, 218 NLRB No. 87, 3.

38 *Marshall Field & Co., supra*, 93-95; see also *The May Department Stores Company, supra.*

cumstances and special needs are shown to warrant them. [39]

As noted previously, the Respondent's revised rule provides that "[d]uring the nonworking time of employees' working hours, solicitation is permitted only in non-patient and in non-public areas of the hospital, and distribution of written material is limited to non-work areas and non-patient areas and non-public areas." Manisfestly, the rules does not describe with sufficient clarity the particular areas where employees may or may not engage in union solicitation and distribution during their nonworking time. There is no reliable indication in the rule whether, for example, employees are permitted to engage in this activity in the cafeteria, refreshment places, restrooms or lounges where they might be during their free time if a visitor or other member of the public happened to be present. Indeed, to define the specific areas where union solicitation and distribution are permitted or forbidden under the rule, the Respondent made part of the record in this case 11 blueprints of the hospital facilities on which numerous such areas are designated. However, there is absolutely no evidence that this information was ever conveyed to employees or that they were otherwise aware of it. Such vagueness and ambiguity in the Respondent's newly-adopted rule can have no other than a deterrent effect on employees who might otherwise desire to exercise their organizational rights lest they risk discipline for unwittingly violating the rule. Yet, as the Second Circuit Court of Appeals had the occasion to observe in a comparable situation, "The true meaning of the rule might be the subject of grammatical controversy. However, the employees of respondent are not grammarians. The rule is at best am-

39 *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB 769-770, enforcement denied 472 F.2d 1380 (C.A. 6); *Guyan Valley Hospital, Inc.*, 198 NLRB No. 28, TXD 11; *Cedar Corp., d/b/a West Side Manor Nursing Home*, 203 NLRB 100, 103-104; *Harold R. Bursten and Dr. Robert Bursten, A Partnership, d/b/a Shorewood Manor Nursing Home & Rehabilitation Center*, 217 NLRB No. 55, 4, Member Penello's separate concurring and dissenting opinion.

biguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it." [40] Nor is the ambiguity weakness in the rule eliminated by the Respondent's suggestion in its brief that, if the employees have any questions concerning the scope of the rule, they could seek clarification from their department head or the Personnel Department. Certainly, such inquiries would reveal the employees' union involvement or sympathies which they are undeniably privileged not to disclose to their employer.

Apart from the ambiguous nature of the rule, there can be no doubt that the rule imposes restrictions on union solicitation and distribution during an employee's nonworking time and in nonwork areas beyond those normally permissible under established law. [41] While the Board recognizes that a broad no-solicitation, no-distribution rule may be valid under special circumstances, the record contains no evidence demonstrating the need for prohibiting such activity in the specific areas claimed by the Respondent. For example, no evidence was adduced to show a reasonable probability of interference with hospital operations or efficiency or that the health and care of patients would be adversely affected, if union solicitation or distribution occurred during an employee's nonworking time in nonwork areas where visitors or the public might be present. In fact, as previously discussed, nonunion related solicitation has taken place in the hospital in the past without any apparent serious disruption of hospital routine. Plainly, the mere asertion that broad restrictions on union solicitation and distribution in the hospital are required can hardly prove the need or justification for them.

40 *N.L.R.B. v. Harold Miller, et al. d/b/a Miller-Charles and Company*, 341 F.2d 870, 874 (C.A. 2).

41 See, for example, *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB 769; *Cedar Corp., supra*, 104.

In view of the absence of special circumstances shown by the Respondent to warrant the restrictions imposed by the quoted portion of the revised rule and in view of its ambiguity, I find that the rule to that extent is invalid and constitutes an infringement of the employees' Section 7 rights and therefore violates Section 8(a)(1) of the Act.

IV. The Remedy

Pursuant to Section 10(c) of the Act, as amended, it is recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and like and related conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning a union meeting, the number of union cards signed by employees, the number of employees involved in the Union, and the identity of the employee head of the Union's organizing committee; by inviting employees to report to the personnel director union solicitation by fellow employees and their other organizational activities; and by promulgating and maintaining in effect an invalid no-solicitation, no-distribution rule which unduly limits such activity by employees on behalf of the Union during their nonworking time in nonwork areas, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in other conduct violative of Section 8(a)(1) of the Act, as alleged in the complaint in Case 30-CA-3082.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[42]

ORDER

The Respondent, Lutheran Hospital of Milwaukee, Inc., of Milwaukee, Wisconsin, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively questioning employees concerning employees' union sympathies and activities, meetings held by National Union of Hospital and Health Care Employees Local 1199W, RWDSU-AFL-CIO, the number of cards signed by employees for the named Union, the number of employees involved in that Union, and the identity of the employee head of the Union's organizing committee.

(b) Inviting and requesting employees to report to it union solicitation by fellow employees or their other organizational activities.

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42 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.84 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Promulgating, maintaining in effect and enforcing any rule or regulation which prohibits employees from engaging in union solicitation in the hospital during nonworking time and from engaging in the distribution of union literature in nonwork areas in the hospital, unless special circumstances and needs of the hospital require such restrictions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join or assist National Union of Hospital and Health Care Employees Local 1199W, RWDSU-AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Forthwith rescind its rule promulgated on or about April 25, 1975 to the extent that it prohibits its employees during their nonworking time from soliciting in its hospital on behalf of a labor organization or from distributing union literature in the nonwork areas of the hospital.

(b) Post at its hospital in Milwaukee, Wisconsin, the attached notice marked "Appendix." [43] Copies of said

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43 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 30, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the receipt of this Order what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case 30-CA-3082 be, it hereby is, dismissed insofar as it alleges other violations of Section 8(a)(1) of the Act than those found herein.

Dated, Washington, D. C.

/s/Paul Bisgyer
Paul Bisgyer
Administrative Law Judge

No. 77-1289

In the Supreme Court of the United States

OCTOBER TERM, 1977

LUTHERAN HOSPITAL OF MILWAUKEE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board, applying the principle enunciated in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150,[1] held that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(1), by promulgating a rule that prohibited employees from soliciting union support and distributing union literature during non-working time in any area to which hospital patients and visitors have access (Pet. App.

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[1]In that case, the Board held that a hospital rule barring employee solicitation of union support or distribution of union literature in any area to which patients and visitors have access was overly broad. Although such activities could be prohibited in immediate patient care areas, restrictions in other areas open to patients, visitors, and employees on their non-working time were invalid, absent a showing by the hospital that special circumstances made the restrictions necessary to maintain patient care or employee discipline.

41-42, 63-64). The court of appeals, concluding that the Board's holding in *St. John's* that "special circumstances rebutting its usual presumptions with respect to solicitation and distribution exist in the immediate patient care areas of a hospital but do not exist outside of those locations, is both logical and just" (Pet. App. 35), sustained the Board's finding that petitioner's rule was overly broad and thus unlawful.[2]

2. *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, argued April 24, 1978, involves the application of the *St. John's* principle to a hospital cafeteria and coffee shop used by employees, patients, and others. The holding in the present case, on the other hand, is not confined "to locations such as cafeterias and coffee shops," but encompasses "all areas to which the public and patients have access" other than " 'immediate patient care areas' " (Pet. App. 36-37).[3]

Should this Court in *Beth Israel* reject the application of the *St. John's* principle to hospital eating facilities, it would probably be unnecessary to consider whether that principle may be applied to other patient access areas generally. On the other hand, should the Court sustain the application of the *St. John's* principle to hospital eating facilities, it may then be necessary to consider the further

[2]But cf. *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368 (C.A. 10).

[3]On March 27, 1978, the Court denied petitioner's motion to consolidate the present case with *Beth Israel*.

question presented in this case. Accordingly, consideration of this petition should be deferred pending this Court's decision in *Beth Israel*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

MAY 1978.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1289

LUTHERAN HOSPITAL OF MILWAUKEE, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF HOSPITAL CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 77-1289

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BRIEF OF HOSPITAL CORPORATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICUS CURIAE

Hospital Corporation of America ("HCA") is the parent corporation or manager of approximately 100 investor-owned or nonprofit hospitals in 24 states. HCA's common stock is traded on the New York Stock Exchange. HCA hospitals have a capacity of approximately 15,000 beds and employ approximately 30,000 people. These hospitals provide general medical and surgical care, with the exception of two psychiatric facilities and a women's hospital, which provide specialized care.

This case asks the Supreme Court to delineate the areas of a hospital in which employees, during their non-working time, may engage in the union activities of solicitation and distribution of literature. In the proceed-

ings below, the National Labor Relations Board ("Board") simply adhered, without discussion or analysis, to its ruling in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976) ("*St. John's*") that it is unlawful for a hospital to prohibit solicitation and distribution of literature in areas of the hospital to which patients and visitors have access, and to limit these union activities to employee-only areas of the hospital. *Lutheran Hospital of Milwaukee, Inc.*, 224 NLRB 176 n. 1 (1976).

The Seventh Circuit agreed with the Board in this case, *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, 564 F.2d 208 (7th Cir. 1977). The First Circuit would permit *St. John's* to be applied to a hospital cafeteria and coffee shop, *NLRB* v. *Beth Israel Hospital*, 554 F.2d 477 (1st Cir. 1977). The *Beth Israel* issue of the lawfulness of a ban on solicitation and distribution in hospital cafeterias and coffee shops is now before this Court in *Beth Israel Hospital* v. *NLRB, cert. granted*, No. 77-152 (Jan. 17, 1978), *and case submitted*, (Apr. 24, 1978).

The District of Columbia Circuit totally disagrees with *St. John's*. *Baylor University Medical Center* v. *NLRB*, ... F.2d ....., 97 LRRM 2669 (No. 76-1940, D. C. Cir., Feb. 14, 1978). The Tenth Circuit also disagrees with *St. John's*, and it denied enforcement to the Board's order in that case, *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977). The Sixth Circuit has the *St. John's* issue under submission in *NLRB* v. *Baptist Hospital, Inc.*, No. 76-1675 (6th Cir.).

HCA has hospitals in eight of the eleven federal appellate circuits, including the Sixth, Seventh, and Tenth Circuits and even though HCA has no hospitals in the District of Columbia, Board orders involving HCA's solicitation and distribution rules are subject to review upon petition by HCA in the District of Columbia Circuit as well

as in the Circuits in which the hospitals are located. *See* 29 U.S.C. §160(e)-(f). The conflict among the Circuits with regard to *St. John's* makes it impossible for HCA to draft a solicitation and distribution rule applicable to all HCA hospitals. By the same token, this conflict among the Circuits and the difficulty it is causing hospitals all across the nation make the *St. John's* issue presented in this case most appropriate for the Supreme Court's resolution.

HCA's interest in a solicitation and distribution rule of uniform application is not its only interest in this case. HCA is more deeply interested in this case because it is concerned by *St. John's* in the following respects:

1. *St. John's*, which permits a hospital to ban solicitation and distribution only in "strictly" patient care areas, does not adequately consider the serious negative impact such union activity could have on the quality of patient care. In HCA hospitals, the hallways, stairwells, and elevators must be kept unimpeded to permit passage of cardiac arrest units and medical personnel responding as quickly as possible to emergency calls. In addition, HCA patients, especially immediately post-operative patients, are encouraged—and, in most instances, required—by their physicians as part of their treatment and recovery to get up out of bed, walk around the hospital, and resume such activities as receiving visitors in the lounges and eating meals in the cafeterias. Under *St. John's*, the Board does not consider that these patient-access areas rise to the level of "strictly" patient care areas, and the Board would require a hospital to permit union activity in these patient-access areas in spite of the potential for disruption, commotion, and patient distress such union activities possess.

2. *St. John's* could have a serious impact on the attractiveness of HCA hospitals to patients and physicians

in comparison with other area hospitals. In most of the cities where HCA has hospitals, there are other hospitals and an abundant number of hospital beds giving potential patients a choice as to which hospital to patronize. Physicians make medical judgments as to which hospital provides their patients with the most tranquil atmosphere for treatment. These are medical judgments with a commercial impact on HCA hospitals. Even nonprofit HCA hospitals have no desire to operate at a loss, and all HCA hospitals must maintain economic soundness because HCA is accountable to lending institutions and investors. If union solicitation and distribution were to be taking place in an HCA hospital in the hallways, stairwells, elevators, waiting rooms, gift shops, vending areas, cafeterias, and entrances, patients and visitors—present and future customers of HCA hospitals—could be disturbed and annoyed by this activity, and they could take their business elsewhere. Physicians could admit their patients elsewhere. HCA is concerned that *St. John's* fails to take into account the commercial interests which HCA hospitals have in maintaining an atmosphere free of disruptions.

3. The *Beth Israel* case, which is presently before the Court for decision, is factually limited to union solicitation and distribution in a hospital cafeteria and coffee shop. *Beth Israel's* facts do not involve other major hospital areas to which patients and visitors have access. By contrast, the instant case raises squarely the *St. John's* issue of whether or not a hospital may ban union solicitation and distribution hospital-wide in patient and visitor access areas, for it calls into question "the full scope of *St. John's*," *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, *supra*, 564 F.2d at 216. HCA is concerned about the possibility that *Beth Israel* does not present this Court with a satisfactory vehicle for resolving the *St. John's* issue

in a hospital-wide context. HCA therefore respectfully suggests that the instant case offers the Court a more satisfactory set of facts on which to resolve the *St. John's* issue.

The foregoing concerns lead HCA to have an interest in this case. These same concerns led HCA to file, with the Federation of American Hospitals, *Amicus Curiae* briefs in *St. John's* at the Tenth Circuit level and in *Baptist Hospital* at the Sixth Circuit level.

HCA contends that *St. John's* is erroneous. It is for this and the foregoing reasons that HCA respectfully submits this brief *Amicus Curiae* in support of Lutheran Hospital's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. This brief is submitted with the consent of the parties, and these written consents have been filed with the Clerk. *See* Supreme Court Rule 42(1).

ARGUMENT

I. The Conflict in Circuits

The heart of this case is the validity of *St. John's*. As detailed *supra*, the Circuits are split on this issue. On the one hand, the First Circuit (*Beth Israel*) and the Seventh Circuit (*Lutheran Hospital*) uphold *St. John's*. On the other hand, the Tenth Circuit (*St. John's*) and the District of Columbia Circuit (*Baylor University*) reject it.

HCA respectfully submits that this Court should exercise its discretionary jurisdiction to resolve such a conflict among the Circuits on an issue directly affecting the nation's hospitals, their patients, and their employees.

II. The Board's Ruling in *St. John's* Is Erroneous, and the Error Significantly Affects the Nation's Hospitals and Their Patients and Employees

In urging this Court to grant Lutheran Hospital's petition for certiorari, HCA shall argue that *St. John's* is contrary to the intent of Congress as manifested by its 1974 amendments to the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* ("Act"). HCA shall point out that there is no evidentiary basis for the holding, and sweeping statements, in *St. John's* and its progeny as to patient needs. HCA shall argue that *St. John's* fails to strike a balance between the organizational rights of hospital employees on the one hand and the rights and needs of patients, their visitors, and hospitals on the other hand.[1]

A. Legislative History of the 1974 Amendments to the Act

In the 1974 amendments to the Act extending coverage to nonprofit hospitals (Pub. L. 93-360, 88 Stat. 395 (July 26, 1974)), Congress expressed a strong awareness that the special circumstances present in hospitals required careful tailoring of the Act especially for the health care industry. Congress did not merely "amend out" the nonprofit hospital exemption, but instead it drafted special provisions specifically for the health care industry. Thus,

1. As previously discussed, the Board simply applied *St. John's* to the instant case without discussion or analysis, and the Seventh Circuit affirmed. HCA's arguments focus on *St. John's* not on *Lutheran Hospital*. With regard to the standard of review to be applied to the Board's *St. John's* ruling in the instant case, it is settled that courts must examine the legal foundations on which Board decisions rest, reviewing such decisions for compliance with the mandates of the Act and the congressional policies underlying the Act. This is especially true where, as here, "the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests. . . ." *NLRB* v. *Brown*, 380 U.S. 278, 291-92 (1965).

for example, the Act contains special notice requirements for the picketing and striking of a hospital (Section 8(g)), special notice requirements for collective bargaining, and special requirements regarding mandatory mediation (Section 8(d)).[2]

One searches in vain in the Board's *St. John's* decision for any indication that the Board even took into account, much less wrestled with, the legislative history of the 1974 amendments. One makes a similar fruitless search through the decision of the Seventh Circuit in the instant case.

HCA respectfully submits that it is time for this Court to ascertain congressional intent with regard to protecting hospital patients from the turmoil and disruption which frequently accompanies union organizing activity, as that congressional intent is manifested in the 1974 amendments to the Act.

2. The District of Columbia Circuit saw the reasons why Congress took a different, narrower approach to the application of the Act to hospitals than to other industries:

> The legislative history of the (Act) as it applies to voluntary, non-profit hospitals reveals an unmistakable solicitude for the peaceful functioning of these institutions, even at some expense to employees' right to organize. . . . (I)n the course of amending the scope of the Act's coverage, Congress clearly evinced its belief that these facilities presented special problems which mandated a different approach to the application of the (Act) than that taken in other fields.

Baylor University Medical Center v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2671. The District of Columbia Circuit went on to quote from the legislative history of the 1974 amendments as contained in the Report of the Senate Committee on Labor and Public Welfare:

> In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act. . . .
>
> * * *
>
> Many of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions. There was a recog-

(Continued on following page)

B. *St. John's* Lacks an Evidentiary Basis

In *St. John's*, the Board drew distinctions between "strictly" patient care areas and areas to which patients and visitors have access, and between confined and ambulatory patients.

One of the most startling features of *St. John's* is that the record in that case contained no evidence on the foregoing distinctions drawn by the Board. Indeed, as noted by the District of Columbia Circuit:

> The St. John's case was submitted to the NLRB on six stipulations and no evidence was presented on the question of how distribution or solicitation would affect patients.

Footnote continued—

> nized concern for the need to avoid disruption of patient care wherever possible.
>
> It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice requirements and other procedures related to potential strikes and picketing.

Sen. Rpt. No. 93-766, 93d Cong., 2d Sess. at 3, 6, reprinted in 1974 U.S. Code Cong. & Admin. News, vol. 2, 3946, 3948, 3951.

With regard to the argument that perhaps Congress was concerned only with preventing the disruptions which would be caused by actual strikes or picketing, the District of Columbia Circuit responded as follows:

> (W)e find no support for such a narrow reading of the congressional purpose. On the other hand, the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance between preventing possible sources of disruptions in hospitals and protecting employees' right to organize. *Moreover, it seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury right be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.*

Baylor University Medical Center v. *NLRB, supra*, ... F.2d at ....., 97 LRRM at 2671 (footnotes omitted, emphasis added).

Baylor University Medical Center v. *NLRB, supra*, ... F.2d at ..... n. 61, 97 LRRM at 2675 n. 61. *See also St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra*, 557 F.2d at 1372-73.

Since there was no evidence in the *St. John's* record to support the Board's conclusions, it is necessary to examine the Board's reasoning in *St. John's*.

Does sound reasoning support the Board's distinction between confined and ambulatory patients as regards their relative abilities to withstand the unsettling effects of union solicitation and distribution? HCA submits that there is no basis for this distinction. Many seriously ill patients, or patients awaiting surgery or recovering therefrom, are likely to be ambulatory in the modern hospital, where their physicians may encourage and more likely require ambulation as a part of therapy and treatment. Inevitably, a good deal of this therapy and treatment will be taking place in the hallways and other public areas of a modern hospital. It is thus patently unreasonable to conclude, as the Board did in *St. John's*, that only bedridden patients should be protected against the unsettling effects of union activities by hospital employees. It is even more patently unreasonable for the Board to arrogate unto itself the *medical* determination that some patients are "healthy" enough to be exposed to this union activity.

The Board has also drawn a line between hospital areas supposedly devoted to "strictly" patient care and areas accessible to patients and visitors. Just as no line can be drawn between ambulatory and bedridden patients in the modern hospital, no line can be drawn between these areas of a hospital. Evidence before the Court in *Baylor University Medical Center* v. *NLRB, supra*, showed

that "a great deal of the physical therapy undertaken at Baylor actually took place in the corridors, . . ." ..... F.2d at ....., 97 LRRM at 2672.

Moreover, as the Tenth Circuit pointed out in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra,* in the case of *Mount Airy Foundation,* 217 NLRB 802 (1975), which involved the classification of various hospital employees for purposes of forming appropriate bargaining units, the Board refused to draw a distinction between "direct" and "indirect" patient care employees. As the Board stated in *Mount Airy*:

> If any particular fact is evident it is the fact that all employees in the health care industry, sharing as they must a genuine concern for the well-being of patients, are involved in "patient care." The degree or immediacy of such involvement may concededly vary but, . . . distinguishing between "direct" and "indirect" care can fairly be anticipated to be a distinction of specious value.

217 NLRB at 802.

Even the First Circuit in *NLRB* v. *Beth Israel Hospital, supra,* recognized that "a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital." 554 F.2d at 482 n. 6.

At a minimum, then, *St. John's,* attempting as it does to draw a "distinction of specious value" between "strictly" patient care areas and areas accessible to patients and visitors, leaves open to perhaps years and years of litigation which areas of a hospital belong in each category. *See Lutheran Hospital of Milwaukee, Inc.* v. *NLRB, supra,* 564 F.2d at 216.

The Tenth Circuit reached the correct conclusion with regard to the artificial, unfounded distinctions the Board attempted to draw in *St. John's*:

> We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were not drawn from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations.

St. John's Hospital and School of Nursing, Inc. v. *NLRB, supra,* 557 F.2d at 1373.

It is perhaps unfortunate that this Court has not had the benefit of record evidence concerning the deleterious effects on patients of union activities in patient access areas. This paucity of evidence is probably explainable by the Board's sudden reversal in *St. John's* of its previous policy allowing restrictions on solicitation and distribution in health care facilities in all areas to which patients and visitors had access. As the Tenth Circuit noted in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB, supra*:

> The Board concedes that the Sixth Circuit decision in *NLRB* v. *Summit Nursing Convalescent Home,* 6 Cir., 472 F.2d 1380, upholding a rule prohibiting solicitation and distribution in all patient and public access areas, and its own decision in *Guyon Valley Hospital, Inc.,* 198 NLRB No. 28, upholding restrictions on solicitation in all working areas, accurately represent the state of the law prior to the 1974 amendments to the Act.

557 F.2d at 1374. These were the decisions reflecting Board policy when such cases as *Beth Israel* and the instant case were tried before the Board's Administrative Law Judges and when Congress wrote special provisions into the Act for health care institutions.

Fortunately, abundant evidence was before the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB, supra*:

> Experienced witnesses testified of the extent to which congestion in the corridors impedes the operation of the medical staff and annoys patients and visitors.
>
> * * *
>
> There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard-taxed emotionally. And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities.

_____ F.2d at _____, 97 LRRM at 2672, 2673 (footnotes omitted).

The instant case and the District of Columbia Circuit's decision in *Baylor University* provide this Court with adequate facts upon which it can make a decision as to the restrictions which can lawfully be placed on the union activities of solicitation and distribution in patient and visitor access areas of hospitals.

C. *St. John's* Fails to Strike a Proper Balance

HCA submits that *St. John's* fails to strike a proper balance between the interest of hospital employees in engaging in union activities in the work place, and the interests of patients, their visitors, and hospitals in the best possible patient care. As previously discussed, the legislative history of the 1974 amendments evidences a strong congressional concern for the special needs of hospitals to maintain a tranquil atmosphere so that the patients therein are free of all possible distractions and disruptions. This congressional concern calls for a very delicate balancing of interests in order to arrive at a proper solicitation and distribution policy which accommodates the interests of all concerned. The statement of the District of Columbia Circuit merits repeating here:

> (I)t seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury might be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.

Baylor University Medical Center v. *NLRB, supra,* _____ F.2d at _____, 97 LRRM at 2671 (footnote omitted).

There is no reason to dispute that union solicitation and distribution present the possibility of disrupting the normal operations of any business. "By its nature solicitation may be disruptive to the maintenance and operation of the employer's business and essential internal discipline," *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 277 F.2d 759, 762 (5th Cir. 1960), and it "may cause argument and dissension among employees." *TRW, Inc.* v. *NLRB*, 393 F.2d 771, 774 (6th Cir. 1968). No person of sound mind would want to be a patient in a hospital where

the employees are not devoting all their energies to patient care. Even the most ardent union supporter might question whether the best patient care is being provided in a hospital where the employees appear to be devoting their energies to something other than patient care. As a practical matter, would patients and visitors realize that the arguments and dissension accompanying union solicitation and distribution in areas to which they have access—in the very hallways next to patient rooms—are only the activities of employees during their "nonworking time?" Would not the visitors whose loved one's life or death may depend on expert medical care be apprehensive if they observed the hospital employees who provide such care debating and arguing about unions? Would not this apprehension be compounded many times if the overheard arguments involved the possibility of employees walking off their jobs and striking the hospital? At a minimum this apprehension could upset patients and visitors. Indeed, this apprehension could well generate unfounded malpractice claims based solely on the perception of patients and visitors that health care was not being provided when it was supposed to be.[3]

The Board simply did not give adequate consideration to the interests of patients in *St. John's*. Nor could the Board have done so, for the record before it was barren of evidence as to the possibility of patients being upset by solicitation and distribution.

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3. In addition to the evidence before the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, *supra*, with regard to the inherently disturbing effect on sick persons of union activities in a hospital, there is evidence in the record before the Sixth Circuit in *NLRB* v. *Baptist Hospital, Inc.*, *supra*, to the same effect. In *Baptist Hospital*, Drs. Greer Ricketson and Russell Birmingham gave uncontradicted testimony as to the medical need to prevent any activity in a hospital which could interfere with the well-being of a patient. Excerpts from this testimony are attached to this brief as an appendix.

With regard to the interests of the hospital, a hospital is extremely interested in the health of its patients. But in addition, a hospital, like any other business, is interested in remaining economically healthy. In a long line of cases the Board and the courts have recognized the commercial interests of a business in providing its customers a tranquil, pleasant atmosphere free of solicitation and distribution practices which tend to be disruptive. *E.g., Marriott Corp.*, 223 NLRB 978 (1976); *McDonald's of Palolo*, 205 NLRB 404 (1973); *May Department Stores*, 59 NLRB 976 (1944), *enf'd*, 154 F.2d 533 (8th Cir. 1945), *cert. denied*, 329 U.S. 725 (1946); *Marshall Field & Co.* v. *NLRB*, 200 F.2d 375 (7th Cir. 1952, *amended*, 1953). Both the Tenth and the District of Columbia Circuits have recognized that a hospital has a similar commercial interest in providing its customers a disruption-free atmosphere. *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, *supra*, 557 F.2d at 1375; *Baylor University Medical Center* v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2673-74.

Judicial inquiry into a hospital's commercial interests in the solicitation and distribution context to this point has been focused primarily on hospital cafeterias, vending areas, gift shops and the like. With regard to the commercial activity going on in these areas, this Court is aware of the long line of cases involving the limits which can be placed on union activity in the public access areas of restaurants and retail stores in order to protect their commercial interests. These cases have been called to the Court's attention by the *Beth Israel* case. Their applicability to the hospital setting has been discussed by the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, *supra*, ... F.2d at ....., 97 LRRM at 2673-74, and by the Tenth Circuit in *St. John's Hospital and School of Nursing, Inc.* v. *NLRB*, *supra*, 557 F.2d at 1375-76.

The foregoing inquiry is entirely appropriate because a hospital's commercial interest in its cafeterias, gift shops, and the like is indistinguishable from the commercial interest of any restaurant or retail store in immunizing its customers from the disturbances of its employees' union activity. But the foregoing inquiry should be broadened to take into account the fact that a hospital has a commercial interest in the peace of mind of its customers in each and every area of the hospital frequented by patients and visitors. No matter where a patient or visitor is located in a hospital, he is making a consumer's decision on whether or not to continue patronizing that hospital. That decision is based on everything he hears and sees. Similarly, his physician is making a medical decision on whether or not to admit patients to that hospital. Thus, as a practical matter, it makes no difference to a patient, visitor or physician where hospital employees may be observed engaging in union activity. The observation is the same, regardless of whether the employee activity takes place in a hallway, an elevator, a cafeteria, a gift shop, or at the main entrance.

In *St. John's* and its progeny, the Board has shown greater solicitude for the patrons of a McDonald's hamburger stand than for the patients and visitors in a hospital. The Board apparently has a blind spot, for although it is unable to perceive how a *patient* would be adversely affected by exposure to union solicitation and distribution, the Board is able to perceive how the *patron of a hamburger stand* "might gag with rage" at the same activity. *McDonald's of Palolo, supra,* 205 NLRB at 407 n. 18. In other words, while the patron of a hamburger stand has a right "to participate in the eating of his fare free from perhaps exacerbating disturbances which might readily arise from the exercise by the Employer's employees of

their Section 7 rights in working areas even during their nonworking time," *id.* at 407, the ambulatory patient who, by definition, is in the hospital because he is in need of medical care, has no right to be free from such exacerbating disturbances in the hospital hallways, elevators, waiting rooms, cafeterias, or coffee shops.

The Act does not mandate such a situation. There is no basis whatsoever for extending greater protection against disruption and interference to the patrons of restaurants and retail stores than to the patients in the nation's hospitals.

A hospital has a commercial interest in all areas to which patients and visitors have access. This interest of the hospital ought to be taken into account when union solicitation and distribution rules are formulated for hospitals. This interest was not considered by the Board in *St. John's*.

CONCLUSION

For the foregoing reasons, Hospital Corporation of America as *Amicus Curiae* urges the Supreme Court to grant Lutheran Hospital's petition and to decide the extent to which hospitals may ban union solicitation and distribution in areas accessible to patients and visitors.

Dated May 2, 1978.

Respectfully submitted,

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APPENDIX

Excerpts from the record in *NLRB* v. *Baptist Hospital, Inc.*, No. 76-1675 (6th Cir.), *review pending.*

Testimony of Greer Ricketson, M.D.:

First, let me state that I am concerned with the patient's care first, and any other business that might take place in the hospital as far as I as a doctor am concerned, is strictly secondary. So, if I feel any activity within a hospital regardless of whether it be a meeting of some sort or otherwise, I feel interferes with the well being of the patient, then I think it ought not to take place, and without getting too verbose, and we all know a hospital is a place that is a busy place, things are going on continuously all the time, and the people there have jobs to do, and they have to take care of the patients and not only do they have to take care of them, but have to take care of them in the most efficient, quiet and unassuming manner; in other words, not to disturb the patient. A good many of the patients can be upset mentally, psychologically and anyway you might like and may have a definite affect [sic] on the outcome of the case as to whether they get well or not.

For instance, a heart case, maybe he's on a monitor or a pacemaker or whatnot, and certainly this type of case you want him to be perfectly quiet and at ease both physically and mentally, because of the mental upset would raise his blood pressure and might throw him into fibrillation from overupset or tension, so that would be one type of case, and take a cancer case. The patient and the family is [sic] on pins

and needles to start with. Is he going to get through the operation he's going to have. If he gets through the operation, is he going to be cured, or is he still going to have cancer and all these things play in the affect [sic] and the patient's mental attitude is important as well as his physical attitude when he arrives in the operating room as to how well he's going to withstand the trauma of the operation, and so, all these things are important, and what I am saying, there shouldn't be any unnecessary turmoil, confusion, loud noises and things going on that would upset a patient or the patient's family because they go back and if something happens to a patient's family that is upsetting in the hospital, because they go back in and their feelings wear off on the patient, and they themselves irritate the patient by talking about a fight that took place on the first floor or something like that, so it's necessary that they have to maintain an atmosphere of calm and cool.

Source: Transcript 280-82, in Sixth Circuit's Appendix 351-53.

. . . I have tried to explain, psychological attitudes play a good part. If we have a patient that has made up his mind that he's going to die, they can almost will themselves to die.

. . . [I]t doesn't matter whether it's union, and I understand this case has to do with rules and regulations between employers and unions, but it would be the same thing if somebody came through and was selling or soliciting the football gambling sheets.

In other words, there is a nonprofessional attitude going on within the area of the hospital, and if the patient is there, he begins to wonder what kind of

a damn hospital is this. Are they more interested in this than taking care of me, or the family may react the same way, or they may say we thought we were going to a good general hospital whose prime purpose is to get them well if possible and keep them comfortable, and here we see other activities that do not have to do with the taking care of patients and the business of the hospital, and they will get quite upset about it, and not only plain mad at the hospital, but the patient can get quite upset and disturbed and think I must not be in too good a place, and if this sort of things happens in the room, what's going to happen in the operating room, are they going to stop and get in an argument about something else there.

Source: Transcript 287-88, in Sixth Circuit's Appendix 358-59.

Testimony of Russell Birmingham, M.D.:

In the patient where there is any emotional problem that arises within the family, when the patient is in the hospital, we certainly try and shield the patient as much as we possibly can from any bad news of any kind, a car wreck where other members of the family have been injured, and things like this. In the hospital it's where we have multiple patients in the same room, if there are conflicting situations for these people, you try to work this out as harmoniously as you can, and when you have to go to a waiting room area where you are going to meet a family where you have operated on a patient where this patient is in surgery, certainly, if you have bad news for these people, you try to take these people to a family area where you can talk with these people

> in privacy with respect to their needs for privacy, realizing too the effect that the news is going to have on other people waiting there too.

Source: Transcript 151-52, in Sixth Circuit's Appendix 221-22.

> I think if the discussion [among employees concerning unions] becomes volatile or hostile in any form, I think this very definitely would have the potential for adversely affecting the patients and the patient's families.

Source: Transcript 152, in Sixth Circuit's Appendix 222.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1289

LUTHERAN HOSPITAL OF MILWAUKEE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE.[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *amicus curiae* to present its views in a case of great importance in the application of the National Labor Relations Act to the newly-covered health care industry.[3] The question

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest association of health care institutions of its kind in the United States.

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

raised in this case is the extent to which hospitals may regulate employee solicitation and distribution activity in hospital areas frequented by patients, relatives, visitors and the public.

The National Labor Relations Board has acknowledged that its traditional position regarding employer rules on solicitation and distribution is inappropriate for this unique industry. *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB No. 182 (1976).[4] However, in *St. John's* while the Board ruled that the "special considerations" of health care institutions support an expanded prohibition on employee solicitation and distribution activities—it improperly allowed such prohibitions only in "immediate patient care areas".[5]

AHA contended both in briefs and in oral argument in the Tenth Circuit's review of that case that the Board's ruling did not sufficiently protect the interests of its member hospitals, the patients who are served therein or the public who visit the hospital premises. The Tenth Circuit agreed with the hospital and industry positions and denied enforcement to the Board's Order. The Court there held that solicitation and distribution could be prohibited in *all* hospital areas to which patients and visitors have access.

AHA became involved in the instant case when the Seventh Circuit—in direct conflict with the Tenth Circuit's *St. John's* decision—adopted the Board's rule.[6]

Additional litigation has resulted from the Board's repeated application of its erroneous and unsuitable *St. John's* rule. In addition to the Tenth Circuit's *St. John's* decision and the ruling of the Seventh Circuit in *Lutheran*, the District of Columbia Circuit has recently decided *Baylor University Medical Center*

4. See *St. John's Hospital & School of Nursing, Inc.* v. *NLRB*, *den. enf. in part*, 557 F. 2d 1368 (10th Cir. 1977).

5. 222 NLRB No. 182 (1976).

6. AHA filed a brief *amicus curiae* with the Seventh Circuit in support of Lutheran Hospital's petition for rehearing *en banc*.

v. *NLRB*.[7] That Court joined the Tenth Circuit in ruling that the Board's policy regarding hospital solicitation/distribution rules is inappropriate. Another Board decision applying its *St. John's* rule (*Baptist Hospital, Inc.*, 233 NLRB No. 34 (1976)) is presently pending in the Sixth Circuit.[8]

This Court granted certiorari and on April 24, 1978 heard oral argument in *N. L. R. B.* v. *Beth Israel Hospital*.[9] *Beth Israel* however, focuses upon only the propriety of hospital solicitation/distribution rules in hospital cafeterias and coffee shops. This case, unlike *Beth Israel*, presents the application of such rules in all areas of the hospital to which patients, their relatives, visitors and the public use or have access. This case further presents the complete conflict between the circuit courts as to the Board's position on solicitation and distribution rules in a hospital setting.

REASONS FOR GRANTING THE WRIT.

A. The Seventh Circuit's Decision Below Is in Conflict With Other Circuit Court Decisions.

Four circuit courts have considered the issue of a hospital's right to prohibit employee solicitation/distribution activity on hospital premises. Only the Seventh Circuit in the instant case has followed the Board's position that employee solicitation/distribution activity may only be regulated in "immediate patient care" areas of a hospital.

While the Seventh Circuit conceded that "organizational activities can arouse intense emotion and create heated arguments"[10] and that employee solicitation can result in "turmoil",

7. *Baylor University Medical Center* v. *NLRB*, ... F. 2d ....., 97 LRRM 2669 (D. C. Cir. 1978).

8. Dkt. No. 76-1675.

9. *NLRB* v. *Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), *cert. granted* No. 77-152, 46 U. S. L. W. 3446 (January 17, 1978).

10. *Lutheran Hospital of Milwaukee Inc.* v. *NLRB*, 564 F. 2d 208, 215 (7th Cir. 1977).

the Court illogically reasoned that only in immediate patient care areas may such conduct be prohibited. As to other hospital areas to which patients and their visitors have access, however, the Seventh Circuit stated that hospitals cannot regulate employee activity. In its ruling the Court below made a series of unwarranted conclusions about hospital patients and patient concerns as follows:

- ". . . a *typical patient* or visitor would be *indifferent* to solicitation and distribution conducted outside of immediate patient care areas."
- ". . . the conduct of employees in locations such as cafeterias and lounges is *irrelevant* to the *ordinary patient*."
- "We cannot believe that patients and their visitors who are present in these areas are likely to become 'unsettled' upon exposure to organizational activities."
- "Labor organizations are common entities in this country, and only an *extraordinary patient* would be so dismayed at witnessing an attempt to form one that *his health would actually become impaired*."[11] (emphasis added)

Certainly, it is unnecessary to demonstrate that patient health will be actually impaired before solicitation and distribution may be restricted. Hospitals serve every type of patient. There are no "typical" patients or "extraordinary" patients, whatever those terms were intended to mean. All patients however, do have a common need and a common right to a "tranquil atmosphere" in which to heal.

The Seventh Circuit, like the Board, made a distinction between immediate patient care areas and other areas of a hospital. Yet, this very distinction was overturned by the Tenth Circuit in its review of *St. John's* because:

> ". . . the ultimate factual inferences on which the Board's distinction was based were drawn not from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations."[12]

11. *Id.*

Moreover, the Board's *St. John's* rule relied upon by the Court below repudiates the Board's own previous policy regarding hospitals and the affect of solicitation and distribution activities on patients and visitors. This prior policy of the Board was set forth in *Guyan Valley Hospital*, 198 NLRB 107 (1972). In that case the Board said:

> "[it] must be recalled that Respondent's facility is not a manufacturing plant, it is a hospital. . . . Further, the hospital services ill individuals who, in their weakened condition, may readily be upset if they overhear antiunion-prounion arguments among employees while they (the patients) are in their rooms or in the halls or elevators. And a hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence."[13]

As the D. C. Circuit said of *Guyan* in its *Baylor University Medical Center* opinion: "It is surprising that the NLRB changed its own established viewpoint on this matter so utterly, and we find its now repudiated analysis more appropriate than its present position. . . ."[14]

B. The Court Below Erred in Providing Less Protection for Hospital Patients Than for Customers of Retail Stores and Restaurants.

The Seventh Circuit, like the Board, has declined to extend to hospital patients the same degree of protection from the "turmoil"[15] of solicitation and distribution activity as is routinely extended to customers of retail stores and restaurants. For stores

12. 557 F. 2d at 1373.
13. 198 NLRB at 111.
14. 97 LRRM 2669 at 2673.
15. 564 F. 2d at 215.

and restaurants, the Board has developed an exception to its traditional holdings regarding rules on solicitation and distribution. The Board allows the prohibition of such activities in all store and restaurant areas to which customers have access.[16] Surprisingly, the Board's concern for customers has not been extended to hospital patients and their visitors.

The Seventh Circuit attempted to justify the different protection afforded customers of retail stores and restaurants as compared to hospital patients as follows:

- As to stores and restaurants: ". . . insofar as union organizational activities create an abnormal atmosphere on the sales floor or in public areas, they interfere with the employees' job performance and disrupt the store or restaurant's performance of its primary function."
- As to hospitals: ". . . while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function."[17]

The error in this analogy is that the Board has not based its store-restaurant standard on employee job performance considerations. Rather, the Board's concern has been with protecting the customer from "exacerbating disturbances" which may affect the "rapport" between the commercial enterprise and its patron.[18]

16. See *e.g.*, *May Department Store Co.*, 59 NLRB 976 (1944), *enf'd* 154 F. 2d 533 (8th Cir. 1945), *cert. den'd*, 329 U. S. 725 (1946); *J. L. Hudson Co.*, 67 NLRB 1403 (1946); *Goldblatt Bros., Inc.*, 77 NLRB No. 24 (1948); *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf'd*, 200 F. 2d 375 (7th Cir. 1953); *McDonald's Corporation*, 205 NLRB 404 (1973); *Bankers Club Inc.*, 218 NLRB No. 7 (1975); *Marriott Corp.*, 223 NLRB No. 141 (1976).

17. 564 F. 2d at 214.

18. *McDonald's Corporation*, 205 NLRB at 407.

For example, in *McDonald's Corporation*, 205 NLRB 404 (1973) it was found that:

> ". . . there is not probative or substantial evidence that union or other solicitation would not be obvious to Employer's customers. Some solicitation might result in a pleasant and informative chat between the employees on their nonwork time in working areas. On the other hand, it might lead to a bitter exchange of insults or worse, the latter not being likely to be conducive to good digestion by Employer's hopefully otherwise happy customers."[19]

These restaurants were considered to be ". . . retail establishments open to the public and designed and operated so to please each customer that they would be financially successful."[20]

In misstating the store-restaurant rule as based on employee job performance, the Seventh Circuit concluded that hospital patients are similarly upset only when employee job performance is affected. Concluding that most employees work in "immediate patient care areas," the court reasoned that patients would not be upset by solicitation in other areas. The rationale is that disruption caused by off-duty employees in cafeterias, lounges and similar areas is not as upsetting to patients as where patients do see an adverse effect on employees' job performance. This theory overlooks the special need of patients and their visitors for tranquility in times of illness and stress. Nonetheless, this rationale explains the Seventh Circuit's conclusions about the effects of solicitation and distribution on patients. Thus, the court erroneously observed:

- "Patients and visitors do not require absolute quiet in cafeterias and lounges."
- ". . . Patients in general are not adversely affected by organizational activities in areas of a hospital such as cafeterias and lounges."

19. *Id.* at n. 18.

20. *Id.* See also, *Bankers Club, Inc., supra,* in which concern was expressed as to the possible "customer antagonism" caused by solicitation and distribution activities. 218 NLRB at 27.

- ". . . the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient."[21]

The different standard of protection afforded hospital patients as contrasted with customers of stores and restaurants is significant. The concern for the needs of ill patients and their families who seek comfort in a hospital lounge or cafeteria should be at least as great as the concern given to the "digestion," "rapport" and "happiness"[22] of restaurant patrons.

It is significant that the Seventh Circuit recognized that an "abnormal atmosphere"[23] may be created in these other patient and visitor access areas as a result of solicitation and distribution activities. This is in conflict with even the Board's realization that a "tranquil atmosphere"[24] is essential to carrying out a hospital's primary function of patient care.

C. There Is No Basis in Fact or Law for the Board's "Immediate Patient Care Area" Concept.

None of the four Circuit Courts which have considered the Board's policy on hospital solicitation/distribution rules have been able to define the key concept of that policy: "immediate patient care areas." In allowing restrictions on solicitation and distribution in such areas, but not in other patient or visitor access areas, the Board developed a concept unsuitable to the realities of hospital life. This concept is particularly inappropriate because it was not based on any record evidence. As noted above, the Seventh Circuit, unlike the other three Circuit Courts, endorsed the Board's concept. This result was reached by that Court notwithstanding its own observation of the Board's rule that:

21. 564 F. 2d at 215.

22. *McDonald's Corporation,* 205 NLRB at 407.

23. 564 F. 2d at 214.

24. *St. John's Hospital & School of Nursing, Inc.,* 222 NLRB at 1150.

> ". . . further litigation will be necessary to determine in exactly which areas of a hospital solicitation and distribution may be forbidden. In our judgment, however, this clarifying process can take place under the rubric of the Board's decision in *St. John's* as future litigation flashes out a definition of 'immediate patient care areas.' This phrase is far from being unambiguous and it will be open to hospitals to demonstrate that a particular area is functionally given over to patient care."[25]

In *Beth Israel,* the First Circuit did not directly rule on the Board's *St. John's* policy, but made the following critical comment:

> "We would add that a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a 'patient-care area'? Would the waiting room in the emergency ward?"[26]

In *Baylor University,* the D. C. Circuit Court noted that it is "manifestly" impossible "to determine with any confidence and rationality which areas in a hospital are and which are not 'immediately' involved in patient care. . . ." 97 LRRM at 2670.

The Tenth Circuit, in directly overturning the Board's *St. John's* rule, also determined that the concept was inappropriate:

> ". . . the distinction drawn by the Board between 'strictly patient care areas' and 'other patient access areas' necessarily 'involve[s] such ephemeral inquiries' as whether the hallways outside a patient's room are 'strictly' involved in patient care when used for transporting the patient from his room to surgery, but not when used by hospital employees to transport medicines or supplies to a bed-ridden patient. Is a hallway or elevator 'more' involved in patient

25. 564 F. 2d at 216. See also the concurring opinion of Judge Jameson which considered the Board's rule to be "unduly broad if not ambiguous." 564 F. 2d at 216.

26. *NLRB* v. *Beth Israel Hospital,* 554 F. 2d 477, 482 n. 6 (1st Cir. 1977).

> care when used by an ambulatory patient on his or her way to a 'public' cafeteria? Does solicitation carried on in a patient's room or operating room suddenly lose its 'unsettling effect' if moved to the hallway outside the patient's open door or to the elevator in which the patient is being transported to surgery. 'Examples are endless. All lead to the conclusion that the dichotomy poses more problems than it solves.' "[27]

The Tenth Circuit thereupon concluded:

> "Once it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and peace of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others."[28]

In view of this judicial disapproval and outright rejection of the Board's "immediate patient care" area concept, this Court should overturn that arbitrary distinction.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth by the Petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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27. *St. John's Hospital & School of Nursing, Inc.*, 557 F. 2d 1368, 1373 (10th Cir. 1977).

28. *Id.*